Supreme Court, U.S.
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No. __-____

IN THE
Supreme Court of the United States

NANOPIERCE TECHNOLOGIES, INC. (N/K/A VYTA CORP.), KATHY-KNIGHT MCCONNELL, HELEN KOLADA, MAUREEN O'SULLIVAN, JANE SEITZ, STEPHEN SEITZ, AND JAMES STOCK,
Petitioners,
v.

DEPOSITORY TRUST AND CLEARING CORPORATION, DEPOSITORY TRUST COMPANY, AND NATIONAL SECURITIES CLEARING CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Nevada

PETITION FOR A WRIT OF CERTIORARI

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February 4, 2008

QUESTION PRESENTED

Whether state-law claims alleging misrepresentations and omissions by securities transaction clearing agencies are conflict preempted, even though nothing in federal law requires or permits those entities to engage in misrepresentations or omissions to the public, and federal securities law seeks to ensure full and fair disclosure to the investing public.

LIST OF PARTIES TO THE PROCEEDINGS

Petitioners NanoPierce Technologies, Inc. (n/k/a Vyta Corp.), Kathy-Knight McConnell, Helen Kolada, Maureen O'Sullivan, Jane Seitz, Stephen Seitz, and James Stock were the plaintiffs in the Nevada district court proceedings and the appellants in the Nevada Supreme Court proceedings.

Respondents Depository Trust and Clearing Corporation, Depository Trust Company, and National Securities Clearing Corporation were the defendants in the Nevada district court proceedings and the respondents in the Nevada Supreme Court proceed-

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner NanoPierce Technologies, Inc. (n/k/a Vyta Corp.) states the following:

In January 2006, NanoPierce Technologies, Inc. changed its name to Vyta Corp., a Nevada corporation. Vyta Corp. has no parent company, and no publicly held company owns 10% or more of Vyta Corp.'s stock.

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NanoPierce Technologies, Inc. (n/k/a Vyta Corp.), Kathy-Knight McConnell, Helen Kolada, Maureen O'Sullivan, Jane Seitz, Stephen Seitz, and James Stock respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Nevada in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Nevada (Pet. App. 1a-27a) is reported at 168 P.3d 73. The opinion of the Nevada district court (Pet. App. 28a-32a) is not reported.

JURISDICTION

The Supreme Court of Nevada entered its judgment on September 20, 2007. A petition for rehearing was denied on November 5, 2007. *See* Pet. App. 33a-35a. On December 14, 2007, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including February 4, 2008. *See id.* at 57a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.*, and the Securities Act of 1933, 15 U.S.C. § 77a *et seq.*, are set forth at Pet. App. 36a-56a.[1]

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[1] Provisions of the Securities Exchange Act of 1934 and the Securities Act of 1933 are all codified in Title 15 of the United States Code and are cited herein simply as, for example, "§ 78q-1".

INTRODUCTION

Respondents are the major entities that perform the back-office tasks of clearing and settling securities transactions, which occur after the parties and their brokers have agreed on terms. Petitioners are a publicly traded small company and several of its individual investors who lost substantial monies as a result of respondents' misrepresentations and omissions to the public regarding their clearing and settlement activities.

For more than a century, investors have brought claims under state law when a defendant failed properly to uphold its obligation to clear or settle a securities transaction. In 1975, Congress passed legislation permitting the Securities and Exchange Commission ("SEC" or "Commission") to register clearing agencies, and it prohibited unregistered clearing agencies from performing clearing and settlement functions. The SEC-approved rules that are relevant here for the respondent clearing agencies span only three pages, and nowhere in those rules or elsewhere in federal law are respondents required or permitted to mislead the public about their clearing and settlement activities through either affirmative misrepresentations or omissions. Nor did Congress express any intent to preempt such claims; rather, it left unaffected the savings clause enacted in 1934 precisely to preserve such claims and inserted two additional savings clauses to make clear its intention to preserve much of state law affecting clearing agencies.

Yet a majority of the Nevada Supreme Court below – over a powerful dissent – too quickly acceded to respondents' broad-brush claims that federal regulation of clearing agencies is equivalent to a conflict with federal law that somehow preempts state-law

claims alleging misrepresentation about respondents' clearing activities. The Nevada Supreme Court's decision conflicts directly with a decision of the Delaware Supreme Court regarding the preemptive effects of the rules of self-regulatory agencies, as well as with other decisions of the federal courts of appeals and state courts of last resort.

Moreover, that decision also conflicts with *Bates v. Dow AgroSciences LLC*, 544 U.S. 431 (2005), in which this Court soundly reversed an overwhelming tide of lower court decisions finding preemption of state law by a federal statute governing pesticides, explaining that the lower courts had not been careful enough in their analysis. As the Nevada Supreme Court's dissenters pointed out below, the specific analysis and reasoning in *Bates* should have been controlling here in important respects and compels a finding that there is no conflict preemption. The lower courts' misunderstanding of *Bates* – now three years after this Court's decision – demonstrates the need for this Court's additional guidance on the proper articulation and application of conflict-preemption principles. This case raises important concerns about the federal and state policies of full disclosure that govern securities regulation and is an appropriate vehicle for the Court to clarify the conflict-preemption principles that the lower courts must regularly apply.

In the alternative, if this Court does not grant review at this time, it should hold this case for disposition in light of *Altria Group, Inc. v. Good*, No. 07-562, which presents a similar question about the extent to which alleged federal approval of a regulated activity bars state-law claims for misrepresentations concerning that activity.

STATEMENT OF THE CASE

1. More than 150 years ago, the States initiated the first efforts to ensure the integrity of this country's financial markets. *See* 1 Louis Loss & Joel Seligman, *Securities Regulation* 31-43 (3d ed. 1998) ("*Securities Regulation*"); Gerald D. Nash, *Government and Business: A Case Study of State Regulation of Corporate Securities, 1850-1933*, 38 Bus. Hist. Rev. 144, 144-52 (1964) ("*1850-1933 Case Study*"); Louis Loss & Edward M. Cowett, *Blue Sky Law* 3-17 (1958) ("*Blue Sky Law*"). State supervision of the securities industry began as an aspect of the States' traditional regulation of corporations and other business associations. As the number of corporations increased in the middle of the nineteenth century, States responded by passing targeted legislation directly regulating certain types of issuers of securities. *See 1850-1933 Case Study* at 148-49; 1 *Securities Regulation* at 31-32. In 1911, Kansas passed the first "comprehensive licensing system" for the securities industry, one of many state statutes now referred to as "Blue Sky Laws." *See Blue Sky Laws* at 7-9. By 1933, every State but one had enacted such a statute. *See id.* at 10; 1 *Securities Regulation* at 40; *see also 1850-1933 Case Study* at 150-52.

"In the wake of the 1929 stock market crash and in response to reports of widespread abuses in the securities industry," Congress passed "two landmark pieces of securities legislation": the Securities Act of 1933 ("1933 Act") and the Securities Exchange Act of 1934 ("1934 Act"). *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 170-71 (1994). Recognizing that the States, because of jurisdictional impediments and resource deficiencies, lacked the ability to ensure the optimal level of

disclosure nationwide, *see* 1 *Securities Regulation* at 146-51, 219, Congress in the 1933 and 1934 Acts instituted a national regime of mandatory corporate disclosure, *see, e.g.*, § 78j(b) (general antifraud provision making it unlawful "[t]o use or employ, in connection with the purchase or sale of any security . . . , any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe"); 17 C.F.R. § 240.10b-5 (SEC implementing Rule 10b-5, adopted in 1942).

When Congress entered the field of securities regulation in 1933 and 1934, it chose not to displace the existing state systems of securities regulation. The 1933 and 1934 Acts each explicitly preserved applicable state law. *See* 1933 Act § 16, 48 Stat. 74, 84; 1934 Act § 28, 48 Stat. 881, 903. The States have continued their traditional role of protecting investors. "Today all 50 states, the District of Columbia, Guam, and Puerto Rico have blue sky laws in force," with most having adopted the Uniform Securities Act of 1956 and several more the Revised Uniform Securities Act of 1985. 1 *Securities Regulation* at 41-42. State statutes and common law provide significant private remedies for investors harmed by misrepresentation and other misconduct. *See* 9 *id.* at 4114-66. "Congress plainly contemplated the possibility of dual litigation in state and federal courts relating to securities transactions." *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 383 (1996).

2. Clearance and settlement, including the actual transfer of securities certificates from seller to buyer, are so-called "back-office" functions that must be performed for each securities transaction. Clearance is the process of verifying and confirming the terms of the trade, such as the number of shares, price, buyer,

and seller. After a trade clears, it settles on the date prescribed by regulation, when the seller delivers the shares and the buyer delivers payment. If the seller does not deliver the shares on the settlement date, the industry deems it a "fail to deliver." State law has long been the primary, if not exclusive, regulator of clearance and settlement functions. *See* 6 *Securities Regulation* at 2912 ("the securities transfer and clearance process [was] a subject previously left to state law").

For example, state-law claims have regularly been adjudicated against fails to deliver, fraud, misrepresentation, or other actionable conduct or omissions in the clearance and settlement of securities.[2] And the

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[2] *See, e.g., Olde Monmouth Stock Transfer Co. v. Depository Trust & Clearing Corp.*, 485 F. Supp. 2d 387, 397-98 (S.D.N.Y. 2007) (allowing state-law claim for tortious interference to proceed against clearing corporations DTCC and DTC, which are respondents here); *Goldstein v. Depository Trust Co.*, 717 A.2d 1063, 1064 (Pa. Super. Ct. 1998) (DTC's motion to compel arbitration denied in suit brought under state law for breach of fiduciary duty arising from DTC's failure to segregate and account for interest owed on funds paid for shares), *appeal denied*, 736 A.2d 605 (Pa. 1999); *Smith Barney, Harris Upham & Co. v. Liechtensteinische Landesbank*, 866 F. Supp. 114, 117 (S.D.N.Y. 1994) (where DTC "operating procedures" contained no "precise time within which DTC is required to give notice of cancellations or confiscations of securities deposited with DTC," holding that the applicable standard was a "reasonable time" as provided under state common law); *In re Weiss Sec., Inc.*, 542 F.2d 840 (2d Cir. 1976) (denying DTC predecessor's complaint to reclaim securities it had transferred to insolvent company); *Travis Inv. Co. v. Harwyn Publ'g Corp.*, 288 F. Supp. 519 (S.D.N.Y. 1968) (adjudicating state-law claim against transfer agent for failure to transfer shares); *People v. Ruskay*, 152 N.E. 464 (N.Y. 1926) (under New York law and exchange's clearing and settlement procedures, broker's criminal conviction could not be sustained).

Uniform Commercial Code ("UCC") has long governed clearance and settlement of securities.[3] "The original version of [UCC] Article 8, drafted in the 1940s and 1950s, was based on the assumption that possession and delivery of physical certificates are the key elements in the securities holding system. Ownership of securities was traditionally evidenced by possession of the certificates, and changes were accomplished by delivery of the certificates." Lary Lawrence, *Anderson on the Uniform Commercial Code* 596 (3d rev. ed. 2005) ("*Anderson on the UCC*").

3. In the late 1960s and early 1970s, however, the securities industry suffered a "back office paper crunch" due in part to the need to physically transfer stock certificates, continually increasing trading volumes, and the failure of disparate and largely manual clearance and settlement systems to work together effectively. 6 *Securities Regulation* at 2914; *see* S. Rep. No. 94-75, at 5 (1975), *reprinted in* 1975 U.S.C.C.A.N. 179, 183-84. As a result, "many purchasers never actually received their stock certificates nor sellers their money"; and numerous brokers, "faced with liability for these incomplete transactions, went bankrupt." *Bradford Nat'l Clearing Corp. v. SEC*, 590 F.2d 1085, 1091 (D.C. Cir. 1978).

In 1975, Congress enacted the Securities Acts Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 97 ("1975 Amendments"), which addressed multiple issues including but not limited to the back-office crisis. To address that crisis, and in recognition of new data processing and communications techniques,

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[3] *See, e.g., Delaware v. New York*, 507 U.S. 490, 504-05 (1993) (UCC and additional state laws governed determination that depositories and other intermediaries holding securities were "debtors" for purposes of interstate escheat claims).

Congress added § 17A to the 1934 Act, codified at 15 U.S.C. § 78q-1. The Senate Subcommittee on Securities had identified two primary causes of the back-office crisis in securities clearance and settlement: the absence of "a nationwide system for the clearance and settlement of securities transactions" and a "lack of uniformity and coordination among the various methods and systems of clearing and settlement." S. Rep. No. 94-75, at 54, *reprinted in* 1975 U.S.C.C.A.N. 232. Another congressional study concluded that "[c]omplete elimination of the stock certificate is the ultimate goal in modernizing the securities processing system." H.R. Rep. No. 92-1519, at 70 (1972); *see generally* 6 *Securities Regulation* at 2919-22.[4]

Accordingly, Congress "directed" the SEC in § 78q-1 "to facilitate the establishment of a national system for the prompt and accurate clearance and settlement of transactions in securities." § 78q-1(a)(2)(A)(i). Congress authorized the SEC to register and regulate clearing agencies, and it prohibited unregistered clearing agencies from doing business in interstate commerce. *See* § 78q-1(b).[5] The statute also directed

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[4] Following the 1975 Amendments, state laws incorporating UCC Article 8 were revised to reflect that, in most future cases, "ownership of securities would not be evidenced by physical certificates." *Anderson on the UCC* at 597. In particular, the state-law UCC revision provides that "a person acquires a security entitlement if a securities intermediary . . . [i]ndicates by book entry that a financial asset has been credited to his securities account." Nev. Rev. Stat. § 104.8501.2(a). The UCC further defines a "securities intermediary" to include a "clearing corporation" – that is, a "person that is registered as a 'clearing agency' under the federal securities laws." *Id.* § 104.8102(e)(1), (m).

[5] Registered clearing agencies, like securities exchanges, are treated in the 1934 Act as self-regulatory organizations. *See* § 78c(a)(26).

the Commission "to end the physical movement of securities certificates in connection with the settlement among brokers and dealers of transactions in securities." § 78q-1(e). In all respects, Congress charged the SEC to exercise its authority under § 78q-1, "having due regard for the public interest, the protection of investors, the safeguarding of securities and funds, and maintenance of fair competition among brokers and dealers, clearing agencies, and transfer agents." § 78q-1(a)(2)(A).

Section 78q-1 does not address claims concerning clearing or settlement under either state or federal law. The 1975 Amendments, however, left intact both (i) the savings clause of the 1934 Act, which provides that the rights and remedies in the Act "shall be in addition to any and all other rights and remedies that may exist at law or in equity," § 78bb(a); and (ii) the implied private right of action long held by the courts to exist under section 10(b) of the 1934 Act and SEC Rule 10b-5. Thus, nothing in the 1975 Amendments altered the long-established dual system of remedies.

Moreover, the 1975 Amendments made clear, in two internal savings clauses, that clearing and settlement activities are not above the States' authority. *First*, Congress provided that "[n]othing in this section [78q-1] shall be construed to impair the authority of any State banking authority or other State or Federal regulatory authority . . . to make and enforce rules governing [clearing agencies] which are not inconsistent with this chapter and the rules and regulations thereunder." § 78q-1(d)(4).[6]

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[6] *See* 6 *Securities Regulation* at 2926-27 ("Because so many transfer agents and clearing agencies are banks, a political compromise (reminiscent of the 1964 adoption of § 12(i) with

Second, Congress made clear that States are not limited to regulating in ways "not inconsistent" with federal law (*id.*), but may even adopt certain inconsistent rules that *override* the SEC's own rules. In a 1990 amendment, Congress first authorized the SEC, "[n]otwithstanding any provision of State law," to adopt rules concerning both "(A) the transfer of . . . securities" and "(B) rights and obligations of purchasers, sellers," and others "involved in or affected by such transfers," provided that the SEC first makes three findings justifying displacement of state law. § 78q-1(f)(1); *see* § 78q-1(f)(2) (setting out required findings). Nevertheless, Congress then provided what might be called a reverse preemption or clawback power to the States, enabling them to promulgate "a provision that differs from that applicable under the Commission's rule." § 78q-1(f)(3); *see* 6 *Securities Regulation* at 2928 ("[t]hose who drafted this part of the 1990 Act clearly realized that they were walking on eggs" in venturing into this "traditionally state law area").

4. Pursuant to § 78q-1, the SEC registered a number of clearing agencies, including respondents here. In particular, the SEC authorized respondents Depository Trust Company ("DTC") and National Securities Clearing Corporation ("NSCC") to provide automated clearance and settlement of virtually all broker-to-broker securities transactions. DTC

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respect to the registration of bank securities) split jurisdiction between the SEC and the federal bank regulators . . . with respect to transfer agents and clearing agencies that are banks.") (footnote omitted). Although Professor Loss's treatise statement focuses on federal banks and banking authorities, the savings clause itself is not so limited. *See* § 78q-1(d)(4) ("any State banking authority *or other State or Federal regulatory authority*") (emphasis added).

and NSCC, in turn, are wholly owned subsidiaries of respondent Depository Trust and Clearing Corporation ("DTCC").[7] DTCC "is owned by its principal users," which include some 600 "international broker/dealers, correspondent and clearing banks, mutual fund companies and investment banks," as well as its "preferred shareholders," the National Association of Securities Dealers ("NASD") and the New York Stock Exchange ("NYSE").[8] The profits made by DTCC, including its subsidiaries, inure to the benefit of the industry participants that own and use it.[9] In addition, the more transactions processed by DTCC, the more commissions are earned by its industry participant owners and operators.[10]

Respondent DTC's role is to eliminate the movement of paper stock certificates. It acts as a securities depository; changes in stock ownership are electronically recorded in brokers' respective DTC accounts, and there is no physical transfer of security certificates held by DTC. Share owners may in theory demand possession of their certificates – though they must go through their brokers to do so, which is not a quick process. As a practical matter,

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[7] *See* http://www.dtcc.com/about/subs/.

[8] *See* http://www.dtcc.com/about/business/customers.php; DTCC, *Annual Report 2006*, at 50 (2007), *available at* http://www.dtcc.com/downloads/annuals/2006/2006_report.pdf; *Anderson on the UCC* at 598.

[9] *See* http://www.dtcc.com/about/business/customers.php ("As an industry-owned corporation, DTCC and its subsidiaries operate on an 'at-cost basis,' charging transaction fees for services and then returning excess revenue to its members.").

[10] *See, e.g.*, Merrill Lynch & Co., Inc., Quarterly Report (Form 10-Q), at 5, 70 (Nov. 7, 2007) (commissions constituted largest single source of revenues for reported period), *available at* http://ir.ml.com/sec.cfm?DocType=&Year=2007.

therefore, DTC holds the vast bulk of certificates issued by publicly traded companies.

Although the use of a common depository eliminates the need for physical deliveries, an enormous number of entries would still have to be made on DTC's books if each transaction between its participants were recorded one by one. Respondent NSCC (which acts as an intermediary between DTC and brokers) streamlines the necessary accounting functions with its "Continuous Net Settlement" system by recording only the net changes in the positions of each participant at the end of each day. For example, if Broker A in a given day effects numerous individual transactions, purchasing 20,000 shares and selling 10,000 shares of company XYZ, then NSCC will instruct DTC to show that Broker A's DTC account reflects a net gain of 10,000 shares of XYZ for that trading day.

When the SEC registered DTC and NSCC as clearing agencies pursuant to § 78q-1, it expressly stated that state-law standards of care would continue to apply to their conduct in handling securities. Thus, the SEC provided that DTC and NSCC "are each responsible under state or federal law, or both, to protect participants' securities and funds." Order, *Depository Trust Co., et al.*, SEC Release No. 20,221, 48 Fed. Reg. 45,167, 45,179 (Oct. 3, 1983); *see also id.* (declining to impose a "unique federal standard of care for registered clearing agencies").

5. SEC rules typically require stock trades to clear within three (formerly five) business days; that is, the buyer pays the seller and the seller delivers shares to the buyer by the settlement date prescribed by federal law. *See* 17 C.F.R. § 240.15c6-1. When a broker sells more shares than it has on account at

DTC and fails to deliver within the standard three-day clearance period, the buying broker's two traditional remedies have been either to buy those shares in the open market (with the selling broker being responsible for any price increase) or simply to wait for the shares to become available as other transactions are cleared through NSCC.

In 1981, the SEC authorized a third option known as the stock borrow program. That program permits willing brokers unrelated to a transaction to lend (their customers') shares from the broker's DTC or NSCC account. NSCC then credits the borrowed shares to the buying broker's account through an automated system that matches lenders with buyers. The stock borrow program was designed to cure short-term delivery failures by sellers of securities. Although NSCC's rules currently span more than 300 pages, only three pages concern the stock borrow program.[11]

6. Petitioners are NanoPierce Technologies, Inc. ("NanoPierce"), a small Nevada corporation traded on the NASDAQ Over the Counter Bulletin Board, along with several of its individual shareholders.[12] Petitioners brought suit in Nevada state court, alleging that respondents misrepresented the effects of the stock borrow program and caused market manipulation.

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[11] *See* NSCC Rules & Procedures, Addendum C (NSCC Automated Stock Borrow Program Procedures), *available at* http://www.dtcc.com/legal/rules_proc/nscc_rules.pdf.

[12] NanoPierce was renamed Vyta Corp. in January 2006, but Vyta has not been formally substituted as the named plaintiff in the Nevada state courts. Because the court decisions and pleadings below all refer to NanoPierce, we retain that nomenclature here for the convenience of the Court.

Petitioners' amended complaint alleges that, despite the stock borrow program's purported development in order to cure short-term failures to deliver, respondents have misrepresented and misused the program so as to permit failures to deliver to remain uncured for months and even years. Such omissions and misrepresentations have facilitated the abusive practice of "naked" short selling, whereby unscrupulous short sellers can rapidly drive down the price of a company's shares. In a traditional short sale, the seller sells shares it has first arranged to borrow (typically from a broker) and thus has the shares available to deliver to the buyer on the settlement date. A "naked" short sale is so named because the seller sells the shares *without* borrowing the stock, and thus fails to deliver those shares on the settlement date.[13]

NSCC uses the automated stock borrow program to supply the shares the seller has failed to deliver to the buyer, either because of a naked short sale or for any other reason. The fail to deliver is not thereby cured, however; the seller still owes the shares, but it (via its broker's participation in the stock borrow program) owes them to NSCC rather than the buyer.[14] Both the lending and buying brokers thus effectively "own" the same shares in their DTC accounts; and their customer statements will each reflect owner-

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[13] In selling a stock short, whether in a naked or traditional sale, the seller is betting that the price of the stock will drop before it has to go into the market and buy replacement shares to repay the lender.

[14] *See* http://www.dtcc.com/about/business/tplus3.php ("NSCC steps into the middle of a trade and assumes the role of central counterparty, taking on the buyer's credit risk and the seller's delivery risk.").

ship of the borrowed and delivered shares, but without indicating that the other broker's customer has ownership rights to the very same shares. Moreover, the buyer's broker may make those same shares available for lending in the stock borrow program, with the potential result that not only two investors, but potentially three or more – a potentially unlimited number – are deemed to own the same shares.

The effect of this scheme has been to create millions of unregistered "phantom" shares that artificially increase the electronic supply of the issuers' shares in the marketplace and are not backed by a stock certificate on deposit at DTC. That oversupply of phantom shares drives down the price of the stock and decreases the value of existing shareholders' holdings. For a small capitalization company like NanoPierce, the effect can be devastating because the artificially increased supply of phantom shares in the market materially drives down the price of the stock. Respondents have a strong incentive to continue permitting this practice in order to generate fees, and their industry-participant members likewise benefit from the commissions they receive from their clients for processing naked short sales. *See supra* p. 11 & n.10.

Petitioners allege that respondents have misrepresented these effects of the stock borrow program. Fundamentally, respondents have denied and failed to disclose that the real effect of their operation of the stock borrow program is to create phantom shares that dilute the value of validly issued shares. For example, petitioners allege that respondents have misrepresented that the artificial shares created by the stock borrow program are issued and outstanding shares of NanoPierce. *See* Pet. App. 20a-21a. And

respondents have made misrepresentations about the efficacy of the program as a prompt and accurate settlement mechanism, without disclosing the critical fact that it injects phantom shares into the marketplace, creating artificial oversupply that dilutes the value of a company's stock. *See id.* at 19a-20a. At the same time, respondents have failed to disclose the fact that there have long been significant numbers of fails to deliver in their system, thus diluting the share value of NanoPierce and other firms' securities. Nothing in the SEC's rules permits or requires respondents to misrepresent or fail to disclose that the net effect of the stock borrow program is to create phantom shares – a material fact that respondents had long concealed and have continued to deny throughout this litigation.

Indeed, after this case was filed, SEC Chairman Christopher Cox noted "the serious problem of abusive naked short sales, which can be used as a tool to drive down a company's stock price," and stated that the SEC is "concerned about persistent failures to deliver in the market for some securities."[15]

7. The Second Judicial District Court of Washoe County, Nevada, held petitioners' claims preempted, without stating whether its decision was based on field preemption, conflict preemption, or both. *See* Pet. App. 30a-32a.

On direct review, the Nevada Supreme Court first rejected respondents' reliance on the doctrine of field preemption. *See id.* at 10a-15a. Relying on the savings clauses in both the 1934 Act and the 1975 addi-

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[15] Christopher Cox, Opening Statements at the Commission Open Meeting (July 12, 2006), *at* http://www.sec.gov/news/speech/2006/spch071206cc2.htm.

tion of § 78q-1, the court concluded that "Congress explicitly left room for state laws to supplement the federal regulatory scheme and thus did not reveal a 'clear and manifest' intent to occupy the field of regulating clearing agencies." *Id.* at 14a-15a.

A majority of the Nevada Supreme Court, however, proceeded to find petitioners' claims barred under principles of conflict preemption. The court initially recognized that Congress's intent to preempt state-law claims "must be 'clear and manifest,'" and that there is a "strong presumption that areas historically regulated by the states generally are not superseded by a subsequent federal law." *Id.* at 8a-9a (quoting *Bates*, 544 U.S. at 449). But the court concluded that petitioners' claims are "inextricably entwined with an assertion that respondents have violated their own Commission-approved rules governing the Stock Borrow Program." *Id.* at 17a.

Two justices dissented in part, concluding with respect to petitioners' misrepresentation-based claims that petitioners "are not directly challenging any NSCC rule's language, but rather that respondents represent that they satisfy buy-in requests by purchasing shares in the open market, while instead using the Stock Borrow Program to satisfy buy-in requests." *Id.* at 26a. The dissenters relied on *Bates*'s holding that state-law claims not inconsistent with federal requirements are not preempted:

> Determining whether respondents are liable on state law grounds for inaccurately representing how they executed buying brokers' notifications to purchase shares on the open market is not inconsistent with the Commission's approval of the Stock Borrow Program or the NSCC's rules, even if it indirectly

> causes respondents to choose whether to change those rules or face potential additional lawsuits.

Id. (citing *Bates*, 544 U.S. at 445).[16]

REASONS FOR GRANTING THE PETITION

This case arises in the context of overlapping state and federal securities laws that serve a common purpose: to protect investors by ensuring appropriate transparency and full disclosure of relevant information, and, by so doing, to safeguard the integrity of the securities market. As this Court has explained, the federal securities laws "'substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus . . . achieve a high standard of business ethics in the securities industry.'" *Affiliated Ute*

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[16] The SEC filed an *amicus* brief with the court below urging conflict preemption, based largely on the assertion that petitioners are simply wrong to suggest that the stock borrow program creates artificial or phantom securities. *See* Brief of the Securities and Exchange Commission, *Amicus Curiae*, on the Issue Addressed at 14-16, 22-27 (Nev. filed Feb. 2, 2006). The SEC did so, however, by claiming only that NSCC's accounting system does not accurately "reflect *ownership positions*," pointing out that the "number of securities issued and outstanding is determined by the security issuer." *Id.* at 14-15. At the same time, however, the SEC conceded the correctness of petitioners' claim that the *electronic universe* of shares available for trading can be much larger:

> While the number of securities outstanding does not change because of the clearance and settlement system, the aggregate number of positions reflected in customer accounts at broker-dealers may in fact be *greater* than the number of securities issued and outstanding.

Id. at 16 n.6 (emphasis added). *Accord* Proposed Rule, *Short Sales*, 68 Fed. Reg. 62,972, 62,975 (Nov. 6, 2003) ("At times, the amount of fails to deliver may be greater than the total public float.").

Citizens of Utah v. United States, 406 U.S. 128, 151 (1972) (quoting *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963)). Through the savings clause in the 1934 Act, § 78bb(a), Congress has recognized that state law can further these purposes by providing important remedies for investors who have been deceived or misled. In this case, petitioners' state-law claims – which seek only to ensure that respondents accurately inform the market generally, and their customers specifically, of their actual business practices in administering their stock borrow program[17] – further the federal policies of transparency and investor protection and do not impede the proper functioning of any federal regulatory mechanism.

Nevertheless, the Nevada Supreme Court has held that, because the SEC has approved the rules that govern the functioning of respondents' stock borrow program, Nevada law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-73 (2000) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)), to the extent that a state-law claim authorizes recovery for misrepresentations in connection with that program. *See* Pet. App. 20a & n.46. That decision directly conflicts with a decision of the Delaware Supreme Court concerning the extent to which

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[17] Petitioners' complaint contained several additional claims based not on misrepresentations or omissions by respondents, but on other violations of state law by respondents. These additional claims were also dismissed by the state courts. *See* Pet. App. 21a-23a. Although the state supreme court's judgment was erroneous in its entirety, petitioners seek review in this Court of that judgment only insofar as it affirmed the dismissal of their claims based on misrepresentations or omissions.

the SEC-authorized regulations of self-regulatory organizations preempt state-law claims for misrepresentation; deepens an existing and broader conflict concerning the appropriate treatment of misrepresentations in connection with federally authorized activities; and conflicts with this Court's decision in *Bates*, among other decisions of this Court. Review is warranted for all of these reasons. It is also warranted because of the national importance of the question whether the federal and state policies of full disclosure in the securities markets will apply to what the court below termed an "exploitable flaw" (*id.* at 20a) in respondents' system. In the alternative, if this Court does not grant review at this time, it should hold this case for disposition in light of *Altria Group, Inc. v. Good*, No. 07-562, which presents a similar question about the extent to which alleged federal approval of a regulated activity bars state-law claims for misrepresentations concerning that activity.

I. PLENARY REVIEW IS WARRANTED BY THE CONFLICTS CREATED BY THE DECISION BELOW AND ITS IMPORTANCE TO THE NATIONAL SYSTEM OF SECURITIES REGULATION

A. The Decision Below Conflicts With Decisions Of Other State Courts Of Last Resort And Federal Courts Of Appeals

1. The decision below directly conflicts with *O'Malley v. Boris*, 742 A.2d 845 (Del. 1999). The Delaware Supreme Court there addressed the preemptive effect of a rule of NASD – a self-regulatory organization that is one of respondent DTCC's preferred shareholders. A "negative response letter" is a notification to a broker's client that a change to the

client's account will be made unless the client objects. *Id.* at 847. The defendants in *O'Malley* claimed that an NASD rule authorizing the use of such letters for certain accounts preempted a state-law claim that a broker's notification to its clients was misleading because it failed to disclose the broker's interest in the transaction. *Id.* at 848. The rule "specifie[d] the information . . . [to] be included in such a letter," and the SEC had approved the NASD rule to enhance the "'timely and efficient execution of . . . bulk exchanges without compromising investor protections.'" *Id.* at 848 (quoting SEC Release No. 31,558, 57 Fed. Reg. 58,525, 58,526 (Dec. 10, 1992)) (second ellipsis in original).

The *O'Malley* court found that the NASD rule did not preempt the state-law claim, reasoning that the rule did not "purport to create a 'safe harbor'" for brokers and that "additional disclosure requirements concerning the broker's self-interest would be the same for all customers, [and so] would not be unduly burdensome or otherwise interfere with the purpose of the rule." *Id.* at 849. This reasoning cannot be squared with the Nevada Supreme Court's holding that petitioners' claims are preempted.

The NASD rule in *O'Malley*, like respondents' rules in this case, is a rule of a self-regulatory organization designed to promote the efficient operation of the national securities markets. Like the plaintiffs in *O'Malley*, petitioners claim that respondents have affirmatively misrepresented, and have failed to disclose material facts about, their operation of the stock borrow program. Nothing in the rules on which the court below relied creates a "safe harbor" from such claims. Moreover, respondents could have protected themselves from any such claims with simple,

general disclosures about the risks of phantom shares created by the stock borrow program, and doing so would not have interfered with any legitimate operation of that program. Accordingly, the courts of Delaware would have granted relief to petitioners on the basis of a disagreement with the courts of Nevada about a dispositive question of federal law.

A similar case from the California Supreme Court, *Diamond Multimedia Systems, Inc. v. Superior Court*, 968 P.2d 539 (Cal. 1999), strongly suggests that California would agree with Delaware. *See id.* at 545 (stating that, in market manipulation actions, "[s]hareholders' rights under state and federal law are cumulative," and "Congress has confirmed the independent force of state securities law").

By contrast, the highest courts of New York and Pennsylvania have addressed closely related questions and adopted a position that aligns with that of Nevada. In *Guice v. Charles Schwab & Co.*, 674 N.E.2d 282 (N.Y. 1996), the New York Court of Appeals held that state-law claims based on a broker-dealer's failure to make timely and detailed disclosure of "order flow payments"[18] were preempted by an SEC regulation that had imposed looser disclosure requirements. *See id.* at 289-90. The court held that the effect of tighter state-by-state disclosure requirements would lead to a "'chaotic regulatory structure'" that Congress could not have intended. *Id.* at 290 (quoting *International Paper Co. v. Ouellette*, 479 U.S. 481, 497 (1987)); *see Shulick v. PaineWebber, Inc.*, 722 A.2d 148, 151 (Pa. 1998) (following *Guice*); *see also Dahl v. Charles Schwab &*

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[18] These are payments for routing customers' orders to other dealers for execution. *See Guice*, 674 N.E.2d at 284.

Co., 545 N.W.2d 918, 925 (Minn. 1996) (reaching a similar conclusion with regard to consent requirements under Minnesota agency law). These cases demonstrate the well-entrenched conflict among state courts of last resort on how preemption affects state-law securities claims.[19]

2. Review of the Nevada Supreme Court's judgment also is warranted because that decision implicates a broader division of the state and federal courts over when a federal regulatory approval conflicts with (and so preempts) state-law claims for misrepresentations about the action approved.

The better and more widely accepted view is that state-law claims for fraud, or other claims based on false or misleading representations, rarely conflict with the federal purpose for authorizing regulated activity, because federal policy will almost always be furthered by preventing fraud. The California Supreme Court, for example, has held that federal approval of a wine bottler's label does not preempt a state statute that prohibited the label as misleading because the label contained the word "Napa" but the wine was not made from Napa grapes. *See Bronco Wine Co. v. Jolly*, 95 P.3d 422, 424-25 (Cal. 2004). In reaching that conclusion, the court reasoned that "Congress's overall purposes . . . have been to support the states' efforts to protect consumers from

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[19] In *O'Malley*, the Delaware court distinguished *Guice* because the New York court had relied on a "regulatory history" in which "the SEC had . . . rejected as unworkable" the "very order flow payment disclosures" that the "*Guice* plaintiffs were claiming that state law required." 742 A.2d at 849. No such history is present in this case. If the distinction drawn in *O'Malley* is correct, it shows merely that New York might agree with Delaware rather than Nevada on the question presented, and does not resolve the conflict between this case and *O'Malley*.

misleading labeling, not to permit [such] labeling." *Id.* at 457. The Second Circuit has likewise held that federal regulations governing the drug testing of airline employees did not preempt state-law claims based on misrepresentations made in relation to the tests because those regulations did not contain any provisions regarding false statements. *See Drake v. Laboratory Corp. of Am. Holdings*, 458 F.3d 48, 65-66 (2d Cir. 2006).[20]

Other courts, however, have taken a more aggressive view of preemption that has substantially restricted the scope of state laws providing remedies for misrepresentation. The decision below is one such example, and a recent decision of the Third Circuit provides another. In *Pennsylvania Employees Benefit Trust Fund v. Zeneca Inc.*, 499 F.3d 239 (3d Cir. 2007), *petition for cert. pending*, No. 07-822 (filed Dec. 18, 2007), the Third Circuit held that Food and Drug Administration ("FDA") approval of a label for a prescription drug conflicted with and so preempted state-law claims that a drug manufacturer's advertis-

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[20] In addition, in a decision that sharply conflicts with the decision below, a New Mexico intermediate court of appeals held that state-law fraud claims could proceed against a health-care provider based on a letter containing false statements, even though the text of the letter had been approved by the Health Care Financing Administration. *See Palmer v. St. Joseph Healthcare P.S.O., Inc.*, 77 P.3d 560, 572-75 (N.M. Ct. App. 2003) (reasoning that "Congress could not have intended to grant a federal agency the prerogative" to authorize false statements while leaving the victims "no recourse in court"), *cert. dismissed*, 101 P.3d 808 (N.M. 2004) (table). *See also True v. American Honda Motor Co.*, 520 F. Supp. 2d 1175, 1180-81 (C.D. Cal. 2007) (finding that Environmental Protection Agency ("EPA") approval of a fuel efficiency label did not preempt state-law fraud claims based on advertising other than the label itself).

ing was fraudulent or misleading because it falsely claimed the drug was superior over a competing product. *See id.* at 250-52. A strong dissent in *Pennsylvania Employees* correctly pointed out that the FDA had "not approved the veracity of the particular advertisements in question, and . . . [the] plaintiffs [were] not attacking, directly or indirectly, the labeling approved by the FDA." *Id.* at 255 (Cowen, J., dissenting). The majority, however, opined that "[t]he high level of specificity in federal law and regulations with respect to prescription drug advertising" alone was sufficient to establish conflict preemption. *Id.* at 252. Indeed, in denying leave to amend, the *Pennsylvania Employees* court further held that it would not matter even if the FDA had explicitly refused to approve the specific advertising claims made or if the drug manufacturer had represented to the FDA that it would not make them. *See id.* at 252-53.

These varied decisions show wide-ranging disagreement about the appropriate treatment of state-law misrepresentation claims, and the decision of the Nevada Supreme Court in this case deepens that existing division of authority. For example, *Bronco Wine* requires a showing, before a state law prohibiting fraud and misleading statements will be found to conflict with a federal regulatory authorization, that the authorization approved the particular statements at issue. *See* 95 P.3d at 454 (rejecting an argument that federal law "*authorize[d]*" the misleading statement on the label and stating instead that federal law merely "*d[id] not prohibit*" it). Applied to this case, that reasoning would require reversal, because the NSCC regulations approved by the SEC did not authorize the false and misleading

statements for which petitioners seek relief. By contrast, *Pennsylvania Employees* requires no such showing, as the Nevada Supreme Court did not in this case. Similarly, the Second Circuit's decision in *Drake* requires that the federal authorization from which preemption is to be derived at least have something to do with the regulation of false statements – a requirement that, however basic it may seem, the Nevada Supreme Court did not observe here. The applicable standards are unclear, and a grant of review will enable this Court to bring needed clarity to this area of the law.

B. The Decision Below Conflicts With *Bates*

The decision of the Nevada Supreme Court is, moreover, incorrect and in conflict with several prior decisions of this Court, and that conflict also warrants review. Its clearest error is its failure to follow the reasoning of *Bates*. In that case, this Court interpreted an express preemption clause in the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), which provided that the States "'shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under [FIFRA].'" 544 U.S. at 436 (quoting 7 U.S.C. § 136v(b)). Reading that clause, the Court reasoned that it would not preempt a state law that was "equivalent to, and fully consistent with, FIFRA's misbranding provisions." *Id.* at 447. Although the preemption arguments in *Bates* concerned an express preemption clause, the Court's reasoning replicated the classic conflict preemption inquiry when it concluded that "[p]rivate remedies that enforce federal misbranding requirements would

seem to aid, rather than hinder, the functioning of FIFRA." *Id.* at 451.[21]

Further, the *Bates* Court was unpersuaded by the argument that FIFRA's national purpose of uniformity would be impeded by subjecting pesticide manufacturers to the verdicts of different juries in different States – provided that the juries were applying state-law standards that were "fully consistent with federal requirements." *Id.* at 451-52. The Court emphasized the "basic presumption against pre-emption" of state-law causes of action and the broad role for state regulation under FIFRA. *Id.* at 449. And it reasoned that Congress would have "expressed [its] intent more clearly" than it had in § 136v(b) if it "had intended to deprive injured parties of a long available form of compensation." *Id.* at 449-50 (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984)); *see Silkwood*, 464 U.S. at 251 (finding it "difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct").

The Nevada Supreme Court's reasoning contravenes *Bates* in several respects. The state supreme court should have considered, as *Bates* did, whether the state-law remedies sought by petitioners would "aid, rather than hinder," 544 U.S. at 451, the purposes of the federal securities laws. To do so, the

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[21] *See Hines*, 312 U.S. at 67 (holding that conflict preemption applies when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"); *cf. Metrophones Telecomms., Inc. v. Global Crossing Telecomms., Inc.*, 423 F.3d 1056, 1073 (9th Cir. 2005) (interpretation of express preemption clause precluding "inconsistent" state-law claims is "substantially identical to the analysis of implied conflict preemption"), *aff'd*, 127 S. Ct. 1513 (2007).

court would have needed to take account of the "fundamental purpose" of the 1934 Act to implement a "philosophy of full disclosure," *Basic Inc. v. Levinson*, 485 U.S. 224, 230 (1988) (internal quotation marks omitted), and to give "due regard" for "the protection of investors," § 78q-1(a)(2)(A). In this respect, the state supreme court's conclusion that petitioners' damages "constitute an exploitable flaw inherent in the federally authorized system" misunderstands the correct interplay between federal and state law. If petitioners have a remedy for respondents' fraudulent statements and omissions, then investors can be protected from the consequences of any flaw with tools that Congress contemplated would be available for such purposes – state-law remedies.[22]

Similarly, the court below erred by failing to give adequate weight to Congress's decision to preserve, when it enacted the 1934 Act, "any and all other rights and remedies that may exist at law or in equity." § 78bb(a); *see Leroy v. Great Western United Corp.*, 443 U.S. 173, 182 n.13 (1979) (recounting a draftsman's statement that the "purpose of [§ 78bb(a)] was to leave the States with as much leeway to regulate securities transactions as the Supremacy Clause would allow them in the absence of such a provision"). This savings clause reflects Congress's

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[22] If correct, the decision below also would imply that petitioners have no remedy available under the SEC's Rule 10b-5 – because their state-law claims include a state statute similar to that rule. *See* Nev. Rev. Stat. § 90.570. But it is absurd to say that the SEC either did, or could, authorize respondents to make false and misleading statements in violation of federal law. The logical implication of this result from the premises adopted by the Nevada Supreme Court is merely another sign of that court's error.

intent to preserve state jurisdiction to an even greater extent than does the language in FIFRA, interpreted by *Bates*. Yet the Nevada Supreme Court's analysis gave far less weight to the purposes of the state law, and to the harmony between the purposes of federal and state law, than this Court did in *Bates*. It also neglected this Court's warning that claims about the "disruptive effects" of state-law remedies may be "exaggerate[d]," and this Court's reliance on the "long history of [state] tort litigation" in the relevant field, *Bates*, 544 U.S. at 449, 451, instead simply assuming that state law would be diverse and so disrupt federal policy.[23] This analytic leap is contrary not only to *Bates*, but also to *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), in which a plurality of this Court explained that "[s]tate-law prohibitions on false statements of material fact do not create 'diverse, nonuniform, and confusing' standards," but instead "rely only on a

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[23] Indeed, the court's reasoning on the disruption it feared is difficult to follow. It states that "[i]mposing any state law requirement for efficiency, which, in the absence of any federal standard, would be necessary before appellants could show that respondents have failed to efficiently clear and settle securities transactions here, would compel respondents to alter their federally approved manner of operating the Stock Borrow Program." Pet. App. 20a. But all that is necessary here is to require respondents to disclose and not conceal the fact that their practices have injected phantom shares into the market that dilute the value of validly issued shares. The lower court's holding flies in the face of the federal securities laws' dedication to investor protection, and also of the long-standing requirement that federal preemptive intent be "clear and manifest." *Bates*, 544 U.S. at 449 (quoting *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (quoting, in turn, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))) (internal quotation marks omitted)).

single, uniform standard: falsity." *Id.* at 529.[24] The Nevada Supreme Court dissenters likewise found, correctly, that state-law claims based on misrepresentation in no way interfere with the federal regime because they merely hold respondents to the centuries-old prohibition against misrepresentation. *See supra* pp. 17-18.

Finally, the state supreme court neglected *Bates*'s teaching that federal approval of a regulated activity confers no automatic imprimatur on representations made in connection with that activity, especially when those representations themselves are not approved by the federal agency. *See* 544 U.S. at 443-45. Just as the EPA's approval of the pesticide label at issue in *Bates* did not prevent the plaintiffs in that case from arguing that the manufacturers had breached the warranty claims in those labels (or oral representations not on the labels), *see id.* at 444 & n.17, so the SEC's approval of respondents' regulations creating the stock borrow program should not preempt petitioners' state-law claims seeking relief for respondents' misrepresentations about that program.

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[24] The plurality opinion in *Cipollone* was, in its reasoning on this point, the "narrowest ground[]" for the Court's judgment, and should therefore have been treated by the court below as controlling. *Marks v. United States*, 430 U.S. 188, 193 (1977) (internal quotation marks omitted); *see Cipollone*, 505 U.S. at 544 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (adopting the broader theory that the statute at issue preempted no common-law claims whatsoever).

C. The Petition Raises An Important Issue Meriting This Court's Review

The scope of preemption in this context implicates the federal and state policies of full and fair disclosure to investors in the securities markets and the remedies available to investors in all 50 States. The Nevada Supreme Court's decision rests on a theory that, even though petitioners have been damaged by respondents' conduct, federal policy precludes any State from providing a remedy for the damage respondents have caused.

If the state court were correct, federal policy would bar state remedies that serve the primary goal of the federal securities laws themselves. But that perverse reasoning is inconsistent with the express statutory language and decades of precedent. If the state supreme court's judgment is allowed to stand, petitioners, and many other investors in a similar predicament, will be deprived of an important tool for vindicating the protections accorded them under federal and state law. Moreover, the state courts' erroneous overreading of federal preemption law may infect other cases that turn on this important set of questions about the interaction of federal and state authority.

In addition, this case presents a good vehicle for this Court to clarify the law. The holding of the Nevada Supreme Court rested solely on federal law and disposed of all of petitioners' claims, leaving no room for further proceedings. *See* Pet. App. 24a. In addition, that court, while erring fundamentally in its conflict-preemption analysis, correctly held that field preemption does not apply in this case, thus narrowing the issues to the key points in contention. *See id.* at 14a-15a. If this Court grants review, there

will be no impediment to it resolving the important question presented.

II. IN THE ALTERNATIVE, THIS CASE SHOULD BE HELD PENDING THIS COURT'S DECISION IN *ALTRIA*.

Although this case is fully appropriate for this Court's plenary review, it also is possible that the relevant law may be sufficiently clarified by this Court's forthcoming decision in a recently granted case. On January 18, 2008, this Court granted review in *Altria Group, Inc. v. Good*, No. 07-562. Among the questions presented in *Altria* is whether the FDA's alleged authorization of certain statements by cigarette manufacturers about the nicotine and tar content of their cigarettes conflicts with, and so implicitly preempts, state-law claims that the statements in question are false or misleading. *See Altria* Pet. i.

If this Court reaches the merits of the implied conflict-preemption claim in *Altria*, its decision will likely shed light on the contested questions discussed *supra*, pp. 20-26, especially the appropriate analysis of conflict preemption when state law provides a remedy for misrepresentations made in connection with federally authorized activity. Were that to occur, the Court's normal practice of granting, vacating, and remanding would be appropriate to permit the Nevada Supreme Court to reconsider its holding on implied conflict preemption in light of this Court's most recent pronouncement and application of those principles. This case would nevertheless be a more secure vehicle for resolving and applying implied conflict-preemption principles, because it is possible that the Court will decide *Altria* purely on express preemption grounds and because the implied conflict-

preemption claim in *Altria* may be resolved on the ground that, because the FDA did not formalize its authorization in a rule, the authorization had no preemptive effect. *See Altria* Pet. 22-24.

Nevertheless, if this Court chooses not to grant plenary review in this case at this time, there is a significant possibility that its decision in *Altria* will make clear whether the decision below is on a secure footing. Accordingly, as an alternative to a grant of certiorari, this Court should hold this case for appropriate disposition in light of *Altria*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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SUPREME COURT OF NEVADA

No. 45364

NANOPIERCE TECHNOLOGIES, INC., ET AL.,
Appellants,

v.

THE DEPOSITORY TRUST AND CLEARING CORPORATION, ET AL.,
Respondents.

September 20, 2007

BEFORE THE COURT EN BANC.

By the court, SAITTA, J.:

This case arises from respondents' use of the Stock Borrow Program to facilitate clearing and settling certain broker-to-broker securities transactions. "Clearing and settling" essentially refers to the process by which record ownership of securities is exchanged for funds when sellers transfer securities to purchasers. Respondents are a holding company and its two subsidiary clearing agencies. The clearing agencies and the Stock Borrow Program were created under federal Securities Exchange Commission (Commission) guidelines to expedite the clearing and settling process that, when performed on the scale that respondents perform it – millions of transactions daily – would otherwise be cumbersome, confusing, and costly.

According to appellants Nanopierce Technologies, Inc., and some of its shareholders, respondents' use of the Stock Borrow Program impermissibly decreased Nanopierce's stock value, irrespective of normal market forces. Consequently, appellants instituted the case below, asserting state law challenges to respondents' operation, and representation to participants, of the Stock Borrow Program. The district court ultimately dismissed the action, concluding that federal law in the area of clearing and settling securities transactions preempted appellants' claims. This appeal followed.[1]

The question presented is whether section 17A of the Securities Exchange Act of 1934 preempts appellants' state law claims for damages. We agree with the district court that appellants' state law challenges related to the Stock Borrow Program are preempted by federal statutes and regulations. Specifically, we conclude that, because the state law on which appellants base their claims poses an obstacle to respondents' accomplishment of congressional objectives as explicitly stated in and gleaned from the Securities Exchange Act's framework, and because respondents' compliance with both state and federal requirements concerning the securities transactions at issue in this case is impossible, section 17A of the Securities Exchange Act preempts appellants' claims.

In explaining that determination, we initially set forth a somewhat detailed discussion of respondents'

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[1] Respondents have filed a motion under NRAP 31(d) requesting leave to file a "Statement of Supplemental Authorities." Having considered the motion, and appellants' opposition thereto, we grant it. Accordingly, we direct the court clerk to file respondents' "Statement of Supplemental Authorities," provisionally received on June 22, 2007.

and the Stock Borrow Program's federally enacted roles in clearing and settling broker-to-broker securities transactions, as necessary to understand appellants' causes of action. We then generally set forth the various preemption analyses, before determining the preemption analytical framework necessary to address appellants' causes of action. Finally, we analyze appellants' causes of action in light of that framework to determine whether federal enactments with respect to clearing and settling securities transactions preempt appellants' state law causes of action.

The Stock Borrow Program and its primary clearing agencies – The Depository Trust Company and The National Securities Clearing Corporation

The Stock Borrow Program is principally a result of difficulties that arose under the Securities Exchange Act of 1934, which Congress enacted generally to regulate and control securities transactions in interstate commerce, and specifically to "remove impediments to and perfect the mechanisms of a national market system for securities and a national system for the clearance and settlement of securities transactions."[2] In 1975, to modernize the system in light of technical advances, Congress amended the Securities Exchange Act of 1934 to add section 17A, which directed the Commission to establish a national system "to facilitate" the efficient clearance and settlement of securities transactions, including registering and regulating clearing agencies.[3]

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[2] 15 U.S.C. § 78b (2000).

[3] *Id.* § 78q-1(a)(2)(A).

The primary clearing agencies that the Commission registered, under section 17A, are respondents The Depository Trust Company (DTC) and The National Securities Clearing Corporation (NSCC),[4] subsidiaries of respondent The Depository Trust and Clearing Corporation. With respect to registering the NSCC, the Commission specifically determined that the NSCC's "by-laws, rules, procedures, and systems," including the Stock Borrow Program, were consistent with the Commission's standards and requirements.[5] The DTC and the NSCC are also registered with the Commission as self-regulatory organizations; the Commission has effectively delegated some of its authority to regulate the clearance and settlement of securities transactions to respondents.[6] Respondents thus stand in the Commission's shoes when performing their functions.[7]

Together, the DTC and NSCC, as regulated by the Commission, provide automated clearance and settlement of broker-to-broker securities transactions.[8]

The DTC

The DTC, for its part in facilitating the clearance and settlement of securities transactions, acts as a stock depository, retaining in its vaults the physical

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[4] *See* Depository Trust Co., et al., 48 Fed.Reg. 45,167 (SEC Oct. 3, 1983).

[5] *See id.* at 45,178; *see also* 15 U.S.C. § 78q-1(b)(2)-(3); National Securities Clearing Corporation, 46 Fed.Reg. 3104 (proposed Jan. 13, 1981).

[6] *See* 15 U.S.C. § 78s(a) (2000); Self-Regulatory Organizations, Exchange Act Release No. 34-47978, 80 SEC Docket 1143 n. 50 (June 4, 2003).

[7] *See Dexter v. Depository Trust and Clearing Corp.*, 406 F.Supp.2d 260, 263 (S.D.N.Y.2005).

[8] *See* 15 U.S.C. § 78q-1(b)(3)(A).

stock certificates that a broker has deposited with it on behalf of an investor. Any broker deposit is reflected as a credit in that broker's corresponding DTC account. Although brokers deposit the physical stock certificates with the DTC on behalf of individual investors, all certificates are held in the DTC's vaults in the name of the DTC's nominee, Cede & Co. Thus, once deposited, stock certificate ownership changes are merely recorded electronically in the brokers' respective DTC accounts – no movement of the physical stock certificates occurs.

The NSCC

While the DTC's role in clearing and settling securities transactions essentially includes only retaining the physical stock certificates and updating brokers' DTC accounts to reflect transfers of stock ownership, the NSCC facilitates the actual clearance and settlement of the securities by (1) acting as an intermediary between brokers engaged in a securities transaction, and (2) tracking, over a designated trading period, a broker's transactions with respect to a specific security.

In its role as an intermediary, the NSCC assumes the payment and delivery obligations of the buying and selling brokers, respectively. As regards the NSCC's tracking function, the NSCC keeps track of all of a broker's transactions with respect to a specific security over a designated trading period. This function allows a broker to deliver to or receive from the NSCC, which as noted has assumed the broker's purchase and delivery obligations, the net amount resulting from his purchase and sales of that particular security at the end of the designated trading period.

After the NSCC calculates a broker's payment or delivery obligation with respect to a specified security for a designated trading period, the broker normally owes or is owed shares of that security. The NSCC then transmits that information to the DTC for processing. For the selling broker, the DTC compares the broker's share delivery obligation, if any, to the amount of that share held in the broker's DTC account, to determine whether the broker possesses enough shares to fulfill his delivery obligation. If enough shares are present in the selling broker's DTC account to fulfill that delivery obligation, delivery of those shares occurs by sending the shares through the NSCC to the DTC account of the party owed the securities, the buying broker. If, however, the selling broker does not have enough shares in his DTC account to cover the obligation, *i.e.*, the broker has sold more shares than he possesses, two options for covering the unfilled obligation generally exist: (1) the buying broker, who is owed the shares, after notifying the NSCC, may purchase in the open market the number of shares owed to him – so-called buying-in; or (2) the buying broker simply can wait for the amount of shares owed to him to become available as other securities transactions are processed through the NSCC. According to appellants, these two options were available to a broker before the NSCC implemented the Stock Borrow Program.

Stock Borrow Program

Apparently to obviate the need for a buying broker to exercise either of the two aforementioned options, *i.e.*, to reduce the instances of a buying broker failing to receive the shares owed to him, the NSCC implemented the Stock Borrow Program. The Stock Borrow Program enables NSCC and DTC brokers to lend

shares from their DTC accounts to cover another broker's failure to deliver shares to the NSCC, before any actual failure to deliver occurs. The Stock Borrow Program essentially operates by allowing brokers, otherwise unrelated to the securities transaction that resulted in the delivery obligation, to loan securities that they have on deposit with the DTC to satisfy the delivery obligation.

According to appellants, respondents, as well as brokers, are able to profitably manipulate the Stock Borrow Program, to appellants' detriment. Appellants contend that respondents use undisclosed internal loopholes in the Stock Borrow Program for their own benefit by generating so-called phantom shares, which, appellants allege, have a dilutive effect on Nanopierce's stock value. Because respondents purportedly obscure this process and its effects, appellants assert that they are entitled to relief under state law.

Preemption

Having set forth respondents' operation of the Stock Borrow Program and the bases of appellants' challenges, we now discuss whether federal law preempts appellants' state law challenges related to the Stock Borrow Program. Whether state law is preempted by a federal statute or regulation is a question of law,[9] subject to our de novo review.[10] As an initial matter, we note that, although the Stock Borrow Program itself and the rules describing and

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[9] *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 260 (Ill. 2006); *Doty v. Frontier Communications Inc.*, 36 P.3d 250, 257 (Kan.2001).

[10] *SIIS v. United Exposition Services Co.*, 109 Nev. 28, 30, 846 P.2d 294, 295 (1993).

governing its operation are not federal law *per se*, the Commission promulgated federal regulations, based on Congress's directive set forth by statute, section 17A of the Securities Exchange Act of 1934, as amended,[11] that, among other things, approved the NSCC's rules concerning the Stock Borrow Program's operation.[12]

The preemption doctrine, which provides that federal law supersedes conflicting state law, arises from the Supremacy Clause of the United States Constitution.[13] The Supremacy Clause, found in Article VI, requires that "the Laws of the United States . . . shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[14] Thus, when a conflict exists between federal and state law, valid federal law overrides, *i.e.*, preempts, an otherwise valid state law.[15] Whether a federal enactment preempts state law is fundamentally a question of congressional intent – did Congress expressly or impliedly intend to preempt state law?[16] Even when implied, Congress's

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[11] 15 U.S.C. § 78q-1(a)(2)(A).

[12] *See* National Securities Clearing Corporation, 46 Fed.Reg. 3104 (proposed Jan. 13, 1981); Depository Trust Co., et al., 48 Fed.Reg. 45,167 (SEC Oct. 3, 1983); *see also Hillsborough County v. Automated Medical Labs.*, 471 U.S. 707, 713 (1985) (noting that "state laws can be pre-empted by federal regulations as well as by federal statutes").

[13] *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000) (stating that "[a] fundamental principle of the Constitution is that Congress has the power to preempt state law").

[14] U.S. Const. art. VI, cl. 2.

[15] *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

[16] *Id.*; *see also Barnett Bank of Marion Cty., N.A. v. Nelson*, 517 U.S. 25, 30 (1996).

intent to preempt state law, in light of a strong presumption that areas historically regulated by the states generally are not superseded by a subsequent federal law, must be "'clear and manifest.'"[17]

Express preemption

Congress expressly preempts state law when it explicitly states that intent in a statute's language.[18] Thus, when determining whether Congress has expressly preempted state law, a court must examine statutory language – any explicit preemption language generally governs the extent of preemption.[19]

Implied preemption

When Congress does not include statutory language expressly preempting state law, Congress's intent to preempt state law nonetheless may be implied in two circumstances known as field preemption and conflict preemption. First, under field preemption, preemption is implied when congressional enactments so thoroughly occupy a legislative field, or touch a field in which the federal interest is so dominant, that Congress effectively leaves no room for states to regulate conduct in that field.[20] To determine whether Congress has preempted a field of law, the entire regulatory scheme must be examined to determine whether, based on its level of compre-

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[17] *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) (quoting *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995)); *see also Davidson v. Velsicol Chemical*, 108 Nev. 591, 594, 834 P.2d 931, 933 (1992).

[18] *Cipollone*, 505 U.S. at 516.

[19] *Id.* at 517; *Davidson*, 108 Nev. at 594, 834 P.2d at 932.

[20] *Cipollone*, 505 U.S. at 516; *Hillsborough County*, 471 U.S. at 713.

hensiveness or the nature of the field regulated, Congress intended to preclude states from also imposing requirements on that field.[21] If, based on that examination, it can be inferred that Congress intended to occupy that legislative field, state requirements are preempted regardless of any specific law's conflict.[22]

Second, even when Congress's enactments do not pervade a legislative field or regulate an area of uniquely federal interest, Congress's intent to preempt state law is implied to the extent that federal law actually conflicts with any state law.[23] Conflict preemption analysis examines the federal statute as a whole to determine whether a party's compliance with both federal and state requirements is impossible or whether, in light of the federal statute's purpose and intended effects, state law poses an obstacle to the accomplishment of Congress's objectives.[24]

Field preemption

As an initial matter, we note that, although the parties do not address whether appellants' claims are expressly preempted by any explicit statutory language, no provision within the Securities Exchange Act of 1934, or Congress's amendments thereto, reveals congressional intent to do so.[25] On appeal,

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[21] *Hillsborough County*, 471 U.S. at 713.

[22] *Cipollone*, 505 U.S. at 516.

[23] *Id.*

[24] *Crosby*, 530 U.S. at 373.

[25] We note, moreover, that although an express preemption provision raises a reasonable inference that it evidences the entire extent of Congress's intent to preempt, so that further analysis to determine if any other matters are preempted under an implied preemption theory is unnecessary, that inference is merely an indication of congressional intent, and thus does

appellants essentially contend that the district court erred in applying a field preemption analysis to their claims and concluding in light of that analysis that, because Congress's enactments so thoroughly occupy the legislative field of clearing and settling securities transactions, Congress intended to preclude state law claims like appellants' from imposing any additional requirements on that field. Implicit in appellants' argument is that conflict preemption is the appropriate analytical framework with respect to determining whether federal law governing clearing and settling securities transactions conflicts with and thus preempts their state law claims. According to appellants, their state law claims do not actually conflict with Congress's statutory framework.[26]

With regard to whether Congress intended to occupy the entire field of securities regulation, or more narrowly, the field of clearing and settling securities transactions, provisions within the statutory framework, analyzed in light of states' historical domination over the field of securities regulation, indicate that Congress did not intend to occupy those fields to the exclusion of state law. Although the statutory scheme indicates Congress's intent to occupy much of the securities regulation area, including the clearing and settling of securities transac-

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not foreclose the possibility of implied preemption. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288-89 (1995) (citing *Cipollone*, 505 U.S. at 518).

[26] Appellants' arguments notwithstanding, the district court's order dismissing appellants' complaint did not expressly state whether the order was based on field or conflict preemption, though the court analyzed and employed language characteristic of both doctrines. The court mentioned express preemption only prefatorily.

tions, an examination of Congress's statutory scheme with respect to securities transactions does not reveal the comprehensiveness necessary to infer that Congress intended to wholly occupy that legislative field.[27]

Specifically, when enacting the Securities Exchange Act of 1934, Congress included a provision recognizing that the Securities Exchange Act did not impact any non-conflicting state securities laws:

> [T]he rights and remedies provided by [the Securities Exchange Act of 1934] shall be in addition to any and all other rights and remedies that may exist at law or in equity. . . . [N]othing in this [Act] shall affect the jurisdiction of the securities commission . . . of any State over any security or any person insofar as it does not conflict with the provisions of this [Act] or the rules and regulations thereunder.[28]

This provision does not indicate congressional intent to occupy the entire field of securities regulation, but rather, to occupy that field only inasmuch as state laws "conflict with the provisions of [the Act] or the rules and regulations thereunder."[29]

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[27] *See Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101, 1107 (4th Cir.1989) (recognizing that, within the field of securities, "[t]he states enjoy broad powers to regulate such diverse subjects as [the following]: the registration of securities; the registration of broker-dealers, agents, and investment advisors; and fraud in the sale or purchase of securities and the rendering of investment advisory services").

[28] 15 U.S.C. § 78bb(a).

[29] *Id.*; *accord Herman & MacLean v. Huddleston*, 459 U.S. 375, 383 (1983) (noting that 15 U.S.C. § 78bb(a) revealed that

Likewise, with respect to the narrower field of a uniform nationalized system for clearing and settling securities transactions, as mentioned, Congress authorized the Commission to regulate this area in 1975 when it amended the Securities Exchange Act of 1934 to add section 17A.[30] Although no court opinion appears to address Congress's preemptive intent with respect to section 17A, a provision within section 17A and a subsequent amendment indicate an intent to not wholly occupy that legislative field.

For instance, Congress included a provision in section 17A stating that section 17A shall not "be construed to impair the authority of any State banking authority or other State . . . regulatory authority having jurisdiction over a person registered as a clearing agency . . . to make and enforce rules . . . which are not inconsistent with" section 17A and any rules and regulations promulgated based on section 17A.[31] That provision unambiguously signifies that Congress did not intend to occupy the entire field of national clearance and settlement of securities transactions, since Congress explicitly left room for state banking and regulatory authorities to supplement that legislative field's regulation, so long as any state regulation is not inconsistent with section 17A.

A subsequent amendment likewise reveals congressional intent not to comprehensively regulate the entire national securities clearance and settlement field. Congress amended section 17A, in 1990, to add the following provisions allowing the Commission to

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Congress "rejected the notion that the express remedies of the securities laws would pre-empt all other rights of action").

[30] 15 U.S.C. § 78q-1(a)(2)(A).

[31] 15 U.S.C. § 78q-1(d)(4).

adopt rules inconsistent with state law, but permitting, within two years' time, the states to then enact laws that contradict the Commission's rules:

> Notwithstanding any provision of State law, . . . [after making certain findings,] the [Securities Exchange] Commission may adopt rules concerning . . . the transfer of certificated or uncertificated securities . . . or limited interests (including security interests) therein; and . . . [the] rights and obligations of purchasers, sellers, owners, lenders, borrowers, and financial intermediaries (including . . . clearing agencies) involved in or affected by such transfers, and the rights of third parties whose interests in such securities devolve from such transfers.[32]
>
> Any State may, prior to the expiration of 2 years after the [Securities Exchange] Commission adopts a rule under this subsection, enact a statute that specifically refers to this subsection and the specific rule thereunder and establishes, prospectively from the date of enactment of the State statute, a provision that differs from that applicable under the [Securities Exchange] Commission's rule.[33]

In light of these two provisions, Congress explicitly left room for state laws to supplement the federal regulatory scheme and thus did not reveal a "'clear and manifest'" intent to occupy the field of regulating

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[32] 15 U.S.C. § 78q-1(f)(1).

[33] 15 U.S.C. § 78q-4(f)(3).

clearing agencies.[34] Accordingly, no field preemption exists.[35]

Conflict preemption

Because Congress did not expressly preempt appellants' claims by explicitly stating that intent within the provisions of the Securities Exchange Act, or its amendments thereto, and no field preemption exists, conflict preemption analysis is the appropriate analytical framework in this matter. As noted, conflict preemption analysis generally requires measuring state law claims against the federal statutory framework, and the federal statute's effects and purpose as revealed by that framework, to determine whether a party's compliance with both state and federal law requirements is impossible, or whether the act's purpose would be frustrated if state law were to apply. Here, then, we must determine whether imposing the requirements implicated by appellants' state law claims on respondents is inconsistent with section 17A's purpose of allowing the Commission to regulate and control a national system for clearing and settling securities transactions.[36]

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[34] *Bates*, 544 U.S. at 449 (quoting *New York State Conference of Blue Cross & Blue Shield Plans*, 514 U.S. at 655).

[35] Importantly, moreover, the question here, whether appellants' state-law based claims fit within any of section 17A's provisions to the extent that those provisions leave room for states to impose their own requirements is somewhat inapposite to the issue whether, in light of the statutory scheme Congress enacted, did it manifest a clear intention to pervade the entire field of regulating clearing agencies so that any state law claims would be preempted. In light of the discussed provisions, Congress did not clearly manifest that intent.

[36] *See* 15 U.S.C. § 78q-1(a)(2)(A) and (B) (directing the Commission to "facilitate the establishment of a national system for the prompt and accurate clearance and settlement" of secu-

Appellants' misrepresentation-based claims

To determine whether appellants' claims are inconsistent with respondents' authority delegated from the Commission to operate a Commission-approved national system of clearance and settlement of securities transactions, we necessarily examine the claims.[37] For the purposes of this examination, appellants' claims can be divided into two groups: (1) misrepresentation claims, and (2) non-misrepresentation claims.

Appellants' complaint asserted four misrepresentations with respect to respondents' operation of the Stock Borrow Program. Each alleged misrepresentation provides the basis for appellants' separately asserted causes of action for negligent misrepresentation, intentional misrepresentation, fraudulent misrepresentation, and securities fraud under NRS 90.570. Regardless of the state of mind necessary, if any, to determine liability under appellants' various misrepresentation-based causes of action,[38] the

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rities transactions, including registering and regulating clearing agencies).

[37] *Cf. Cipollone*, 505 U.S. at 524-30 (engaging in a claim-by-claim analysis to determine any express federal preemption of the state law causes of action in that case).

[38] *See Secretary of State v. Tretiak*, 117 Nev. 299, 22 P.3d 1134 (2001) (providing that scienter is not a required element of a cause of action under NRS 90.570 for securities fraud); *Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 956 P.2d 1382 (1998) (noting that one liable for negligent misrepresentation must have failed to exercise reasonable care with regard to the information communicated and that one liable for fraudulent misrepresentation generally must have communicated information knowing its falsity); *Collins v. Burns*, 103 Nev. 394, 741 P.2d 819 (1987) (noting that one liable for intentional (or fraudulent) misrepresentation generally must have communicated information knowing its falsity).

essence of any misrepresentation claim is a false or misleading statement that harmed appellants.[39] Moreover, in addressing appellants' misrepresentation claims in the context of this appeal from a district court order dismissing their complaint, this court assumes appellants' allegations are true[40] – *i.e.*, that respondents made the purported misrepresentations.

Appellants contend that the NSCC, in its rules and procedures, falsely represents that it complies with a buying broker's notification to cure a selling broker's failure to deliver shares by purchasing them in the open market.[41] That representation is false, appellants contend, because the NSCC actually executes those buying broker requests through the Stock Borrow Program, not the open market.

Assuming the truth of that allegation – that the NSCC's rules and procedures represent that the NSCC executes buy-in requests by directly going to the open market, but in truth, the Commission-approved Stock Borrow Program is utilized so that the NSCC never goes to the open market – it appears inextricably entwined with an assertion that respondents have violated their own Commission-approved rules governing the Stock Borrow Program.[42] That is, appellants appear to assert that, by

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[39] *See* cases cited *supra* note 38.

[40] *See Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 845, 858 P.2d 1258, 1260 (1993).

[41] *See* National Securities Clearing Corp., 46 Fed.Reg. 41,892 (Aug. 18, 1981).

[42] *Cf. United States Department of Agriculture v. Hunter*, 171 F.2d 793, 795 (5th Cir.1949) (noting that, for sovereign immunity reasons, a governmental agency cannot be sued for carrying out its duties); *DL Capital Group v. Nasdaq Stock*

using the Stock Borrow Program, respondents do not act in accordance with their rules stating that they will fulfill the buying brokers' needs by going to the open market when so requested, even though the Stock Borrow Program is itself approved by the Commission.[43]

Appellants are, in essence, challenging the Commission-approved NSCC's rules' language, and thus, this claim is preempted for that reason.[44]

Appellants claim that respondents falsely represented, in the NSCC's rules and procedures manual, that the Stock Borrow Program satisfies delivery obligations by *borrowing* shares, since in reality those transactions constitute *sales*. Those transactions are sales, according to appellants, because when the

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Market, 409 F.3d 93, 97-98 (2d Cir.2005) (recognizing that as the Commission would be absolutely immune from suit for carrying out its functions, self-regulatory organizations have similar immunity when acting under authority that the Commission delegated to them); *id.* at 98 (providing that "allegations of bad faith, malice, and even fraud . . . cannot, except in the most unusual of circumstances, overcome *absolute* immunity").

Indeed, appellants conceded at oral argument that, to the extent their claims implicate rule violations, they may be preempted.

[43] This is so even though, in appellants' opening brief, they state that "[t]he district court correctly observed that [appellants] 'have not alleged that the NSCC violated any rules governing [the Stock Borrow Program].'"

[44] *Cf. Barnett Bank of Marion Cty., N.A.*, 517 U.S. at 31-32 (recognizing that when state law prohibits what a federal enactment permits, the federal enactment overrides the state law). *See generally Bantum v. American Stock Exchange, LLC*, 777 N.Y.S.2d 137, 140 (App.Div.2004) (noting that "the [Securities] Exchange Act [of 1934] establishes a scheme of regulation of the securities marketplace that combines self-regulation . . . with oversight and direct regulation by the [Commission]").

NSCC delivers the borrowed shares to the buyer, the buyer acquires "all right, title[,] and interest in the shares." That allegation appears premised on NRS 104.8501(2)(a), which provides that when an entry crediting a broker's account is made, that broker acquires a securities entitlement. "Securities entitlement" is defined in NRS 104.8102(l)(p) as rights and property interest in a security.

Those provisions notwithstanding, the Commission, in registering the NSCC, expressly approved the NSCC's rules and procedures, including the NSCC's description of the Stock Borrow Program as a procedure involving borrowing shares. Thus, to the extent that NRS 104.8501(2)(a) would require respondents to represent that the Stock Borrow Program satisfies stock delivery obligations through sales of shares, enforcement of this statutory provision would make it impossible for the NSCC to comply with the Commission-approved rules and procedures, describing the program as using borrowed shares. The NSCC could comply with both provisions only by amending its Commission-approved rules. Thus, the district court did not err when it determined that appellants' claims based on this purported misrepresentation were preempted.

Appellants further assert a claim concerning respondents' representation with regard to the efficiency of the clearing and settling process. Appellants allege that respondents falsely represent that they efficiently clear and settle securities transactions, when, according to appellants, respondents allow a selling broker's commitment to deliver the total number of shares sold to remain unfulfilled for prolonged periods. According to appellants, allowing delivery commitments to remain unfulfilled

for extended periods has negative market effects on those shares and artificially inflates the number of shares issued and outstanding. This claim also is preempted.

First, while respondents represent that they efficiently clear and settle securities transactions – indeed, Congress directed the Commission to regulate clearing agencies for that purpose[45] – the degree of efficiency necessary to satisfy that directive is not federally defined. Imposing any state law requirement for efficiency, which, in the absence of any federal standard, would be necessary before appellants could show that respondents have failed to efficiently clear and settle securities transactions here, would compel respondents to alter their federally approved manner of operating the Stock Borrow Program. Therefore, this claim is preempted.[46]

Second, any negative market effects, artificial inflation of shares, or so-called phantom shares that result from respondents not clearing and settling securities transactions as expediently as appellants would prefer, would, it appears, constitute an exploitable flaw inherent in the federally authorized system, preempting state law challenges to that flaw.[47]

Finally, with respect to appellants' misrepresentation claims, appellants challenge respondents'

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[45] *See* 15 U.S.C. § 78q-1(a).

[46] *Crosby*, 530 U.S. at 373 (noting that federal law preempts state law when the state law poses an obstacle to the accomplishment of Congress's objectives and purposes).

[47] *Id.* (recognizing that a federal law overrides any state law that frustrates the federal law's operation within its intended field).

representation regarding the number of shares that a lending broker actually retains in its DTC account after it has loaned shares of a given security. In essence, appellants contend that respondents' method of balancing the DTC and NSCC accounts and subaccounts created when a broker participates in the Stock Borrow Program overlooks the shares actually loaned and thus misrepresents the shares actually held by a lending broker in its DTC account. But like the previous allegation, respondents' method of balancing any accounts created while operating the Stock Borrow Program is a function of operating the Stock Borrow Program, a federally mandated and regulated system. Thus, this claim likewise is preempted.[48]

Appellants' non-misrepresentation claims

Appellants' remaining, non-misrepresentation claims include unfair trade practices in violation of NRS 598A.060, market manipulation in violation of NRS 90.580, conversion, intentional interference with contractual relations, breach of the implied covenant of good faith and fair dealing, and conspiracy. Those claims are preempted, as their mere descriptions, set forth below, demonstrate that they manifestly attack either the federally regulated operation or existence of the Stock Borrow Program.

Specifically, appellants' contention that respondents engaged in unfair trade practices in violation of NRS 598A.060 challenges respondents' representation that the Stock Borrow Program efficiently clears and settles trades and asserts that respondents "have illegally tied the Stock Borrow Program to the

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[48] *Id.*

separate and distinct functions of clearing and settling stock trades."

As regards appellants' NRS 90.580 market manipulation cause of action, appellants assert that, because respondents use the Stock Borrow Program as their predominate means of satisfying their share delivery obligations, instead of purchasing shares in the open market on a buying broker's notification, respondents conceal the demand for the stock of the company at issue. By concealing the demand for a company's stock, appellants assert, the market is misled concerning the demand for and value of that company's stock.

Appellants' conversion claim, as with one of the misrepresentation allegations above, alleges that the Stock Borrow Program does not involve borrowing, but rather creates a security entitlement. Because the Stock Borrow Program creates securities entitlements when Nanopierce shares are loaned, appellants contend, an actual sale is taking place and unauthorized, wrongful dominion is exercised over those shares.

Appellants' intentional interference with contractual relations claim asserts that operating the Stock Borrow Program interferes with Nanopierce's contractual relationships, based on its articles of incorporation, with its shareholders.

Appellants' claim for breach of the implied covenant of good faith and fair dealing alleges that, to the extent Nanopierce shares constitute a contract, the DTC, which holds those shares in its vaults in the name of its nominee, does not act in good faith with respect to those shares when placing them in the Stock Borrow Program.

Concerning appellants' conspiracy claim, they contend that respondents have conspired to use the Stock Borrow Program to manipulate and dilute Nanopierce's stock value.[49]

As set forth above, these non-misrepresentation claims overtly challenge the Stock Borrow Program and respondents' federally regulated operation of it. Therefore, those claims, like the misrepresentation-based claims, are preempted.[50]

Given the Securities Exchange Act's framework and provisions, in particular section 17A, any intent of Congress to occupy the legislative field of clearing and settling securities transactions is not "clear and manifest." Room exists for state laws to supplement that federal regulatory scheme, so long as any such state laws do not actually conflict with the federal law with respect to clearing and settling securities transactions. The question whether section 17A of the Securities Exchange Act and any regulations promulgated thereto – to the extent they concern clearing and settling securities transactions – pre-empt state law claims therefore turns on whether a

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[49] Notably, because respondents are a parent company and its subsidiaries, they have no separate legal existence; thus it appears "impossible for a civil conspiracy to have occurred." *Laxalt v. McClatchy*, 622 F.Supp. 737, 745-46 (D.Nev.1985) (citing *Corbit v. J.I. Case Company*, 424 P.2d 290, 295 n. 3 (Wash.1967)); *see also Collins v. Union Fed. Savings & Loan*, 99 Nev. 284, 662 P.2d 610 (1983) (recognizing that a corporation's agents or employees acting in their official capacities generally cannot conspire with the corporation).

[50] *See generally Dahl v. Charles Schwab & Co., Inc.*, 545 N.W.2d 918, 926 (Minn.1996) (recognizing that, given "the national import and possible effect" of any state law-based decision on a particular securities procedure, such decisions "are for the SEC and Congress").

party's compliance with both state and federal law requirements is impossible, or whether the Securities Exchange Act's purpose would be frustrated if state law applied.

Here, measuring appellants' state law claims against the Securities Exchange Act's framework with respect to clearing and settling securities transactions, and the federal statute's effects and purpose to allow the Commission to regulate and control a national system for clearing and settling securities transactions, reveals that appellants' claims conflict with Congress's regulatory scheme. That is, imposing the requirements implicated by appellants' state law claims, which they primarily base on allegations that respondents conceal flaws in a Commission-approved national system for clearing and settling securities transactions, frustrates Congress's objectives with respect to the clearing and settling regulatory scheme and renders adherence to both that regulatory scheme and state law impossible. Federal law thus preempts appellants' claims. Accordingly, as all of appellants' causes of action are preempted by federal enactments in the area of clearing and settling securities transaction, we conclude that the district court did not err in dismissing appellants' amended complaint, and we thus affirm the district court's order.

We concur: MAUPIN, C.J., GIBBONS, J., PARRAGUIRRE, J., and CHERRY, J.

HARDESTY, J., with whom DOUGLAS, J., agrees, concurring in part and dissenting in part:

The majority correctly determines that no field preemption exists in the general area of securities regulation and the specific area of clearing and settling securities transactions. I agree, moreover, with much of the majority's analysis regarding conflict preemption, which, as the majority notes, generally examines whether a party's compliance with both state and federal requirements is impossible or whether, in light of the federal law's purpose and intended effects, state law poses an obstacle to congressional objectives.[1] But in concluding, in light of such an examination, that all of appellants' state law causes of action conflict with federal law for a national system of clearing and settling securities transactions, the majority mischaracterizes appellants' allegation that the NSCC, in its rules and procedures, misrepresents that it complies with a buying broker's notification – *i.e.*, buy-in request – to cure a selling broker's failure to deliver shares by purchasing them in the open market, when instead, the NSCC utilizes the Stock Borrow Program. Thus, although I agree with the majority that federal law preempts most of appellants' claims, I would reverse the district court's order with respect to appellants' four causes of action based on that alleged misrepresentation and remand this matter for further proceedings.

The majority characterizes appellants' buy-in-request-based allegation as attacking the language of an NSCC, Commission-approved rule, which, if

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[1] *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-73 (2000).

that characterization were accurate, unquestionably would be preempted. But that characterization is not accurate. Appellants specifically allege that respondents "misrepresented" to them that unsatisfied share delivery commitments would, on a broker's buy-in request, be cured by purchasing the necessary shares on the open market, when in fact, those unfulfilled obligations are "actually cured by borrowing shares from lending [brokers] through the Stock Borrow Program." In that allegation, appellants are not directly challenging any NSCC rule's language, but rather that respondents represent that they satisfy buy-in requests by purchasing shares in the open market, while instead using the Stock Borrow Program to satisfy buy-in requests. Determining whether respondents are liable on state law grounds for inaccurately representing how they executed buying brokers' notifications to purchase shares on the open market is not inconsistent with the Commission's approval of the Stock Borrow Program or the NSCC's rules, even if it indirectly causes respondents to choose whether to change those rules or face potential additional lawsuits.[2]

Indeed, it does not appear impossible for respondents to comply with Nevada's misrepresentation jurisprudence by accurately stating how notifications to purchase shares on the open market are executed while simultaneously complying with federal law controlling a national system for clearing and settling securities transactions. Nor does any such compliance appear to frustrate the accomplishment

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[2] *See Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 445 (2005) (providing that "[a] requirement is a rule of law that must be obeyed; an event . . . that merely motivates an optional decision is not a requirement").

of Congress's objectives with respect to that regulatory scheme.

Therefore, as appellants' buy-in-request-based allegation does not conflict with federal law controlling a national system for clearing and settling securities transactions, I would reverse the district court's order with respect to appellants' causes of action based on that allegation and remand this matter for further proceedings.

I concur: DOUGLAS, J.

IN THE SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

Case No. CV04-01079

NANOPIERCE TECHNOLOGIES, INC., ET AL.,
Plaintiff,

v.

THE DEPOSITORY TRUST AND CLEARING CORPORATION, ET AL.,
Defendants.

[Filed April 28, 2005]

ORDER

The court has read and considered the legal memorandum submitted in support of and opposition to Defendant's *Motion to Dismiss the Complaint* filed on July 30, 2004 and re-submitted March 4, 2005 as well as the oral arguments presented on February 16, 2005.

The dispute arises over the practice of clearing and settling securities through the Defendant institutions. Defendants are New York-based clearing and depository institutions explicitly authorized by the Securities and Exchange Commission (herein "SEC").[1] Plaintiffs claim that Defendants' federally

[1] The Depository Trust and Clearing Corporation (herein "DTCC") operates as a holding company, which consists of four subsidiaries: the Depository Trust Corporation (herein "DTC"), the National Securities Clearing Corporation (herein "NSCC"),

authorized clearing and settlement services, specifically the Stock Borrow Program (herein "SBP"), devalued Plaintiff Nanopierce's stock. Plaintiffs contend that SBP authorizes and facilitates naked short selling by market participants.[2] Defendants bring this motion to dismiss pursuant to NRCP 12(b)(5) arguing that Plaintiffs' claims fail because they are barred under the preemption doctrine.[3]

Motion to Dismiss

In considering a dismissal under NRCP 12(b)(5), the Court must construe the pleadings liberally and draw every fair inference in favor of the non-moving party. *Simpson v. Mars Inc.*, 113 Nev. 188, 929 P.2d 966 (1997). A complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff cannot prove any set of facts, which, if accepted by the jury, would entitle it to relief. *Id.* at 191. Nevada has a strong policy favoring

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the Fixed Income Clearing Corporation, and the Emerging Markets Clearing Corporation. The DTC is the nation's largest securities depository and clearinghouse for settlement of securities trading activity. The NSCC is a New York corporation that provides centralized clearance, settlement, and information services for virtually all broker-to-broker equity, corporate bond, municipal bond, exchange-traded funds and unit investment trades.

[2] The SBP, operated by NSCC, assists in settling transactions from which a delivery obligation remains open. Under the SBP, NSCC borrows members' shares of stock which are voluntarily loaned for the purpose of settling transactions where participants have not made sufficient shares available to satisfy delivery obligations. The SEC has explicitly approved the program.

[3] Although Defendants also assert that Plaintiffs' claims should fail on other grounds, the Court only addresses the preemption argument.

the resolution of disputes on the merits. *Yochum v. Davis*, 98 Nev. 484, 487, 653 P.2d 1215 (1982).

Defendants assert that Plaintiffs' causes of action should fail because the field has been so thoroughly occupied by federal law as to preempt state regulation of the federally authorized practices which are the subject of the complaint in this action. Whether a state law is preempted is a matter of congressional intent. If Congress intended to exercise its constitutional authority to supersede the laws of a state, the Supremacy Clause of the Constitution of the United States requires courts to follow federal law. *Levintin v. PaineWebber, Inc.*, 159 F.3d 698, 705 (1998). If the federal law does not contain explicit language regarding preemption, courts must consider whether the federal statute's structure and purpose, or non-specific statutory language, reveal a clear, implicit preemptive intent. *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25, 116 S.Ct. 1103 (1996). Preemptive intent may be inferred when "the federal statute created a scheme of federal regulation 'so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it.'" *Levintin*, 159 F.3d at 705 (quoting *Barnett Bank*, 517 U.S. at 31, 116 S.Ct. 1103).

Federal regulation of the securities industry, especially the clearing and depository institutions, is extensive. In 1975, Congress amended the Securities Exchange Act of 1934 by adding Section 17A. This amendment vested the United States Securities and Exchange Commission (herein "SEC") with the centralized decision-making authority and responsibility to oversee and regulate a uniform national market system for securities transactions. 15 U.S.C. 78q-1(a)(2)(A)(i). Accordingly, Congress granted the SEC

explicit authority to regulate clearing agencies like DTC and NSCC and to approve the regulations governing these agencies. 15 U.S.C. § 78q-1. The SBP is a component of NSCC's rules and was expressly approved by the SEC. SEC Release No. 34-17422, 46 Fed. Reg. 3104 (January 7, 1981).

As stated above, the SBP, which forms the basis of Plaintiffs' complaint, operates to assist NSCC in settling transactions for which a delivery obligation from the seller of securities of remains open. SEC Release No. 34-18027; 46 Fed. Reg. 41892 (August 18, 1981). The SBP operates in an automated fashion without the exercise of discretion by NSCC as to whether any particular open transaction should be covered by SBP. *National Securities Clearing Corp. Rules, Addendum C.* Each member of NSCC elects to participate in the SBP and permits its eligible stock to be made available for borrowing through the SBP program. *Id.* Therefore, if positions remain open and shares are voluntarily made available by members to fill such positions, the system will automatically fill the positions. SEC Release No 37-18027; 46 Fed. Reg. 41892 (August 18, 1981). If a member does not wish to make shares available, NSCC has no power to compel them to do so. *Id.*

As illustrated above, the federal government extensively regulates the securities industry. The SBP is an automated, non-discretionary process specifically approved by the SEC as a component of the nationwide stock transactions' clearing system. Therefore, the Court finds that federal law preempts Plaintiffs' claims for relief. Federal law explicitly permits the SBP to operate. Plaintiffs have not alleged that the NSCC violated any rules governing SBP. Therefore, state law may not be applied as to

impose damages on Defendants. To do this would be to forbid the Defendants from doing what the SEC authorized them to do.

Accordingly, and with good cause appearing, Defendants' *Motion to Dismiss the Complaint* is GRANTED.

DATED: This 27th day of April, 2005.

/s/ BRENT T. ADAMS
DISTRICT JUDGE

IN THE SUPREME COURT
OF THE STATE OF NEVADA

No. 45364

NANOPIERCE TECHNOLOGIES, INC., ET AL.,
Appellants,

v.

THE DEPOSITORY TRUST AND CLEARING CORPORATION, ET AL.,
Respondents.

[Filed November 5, 2007]

ORDER DENYING REHEARING

This is a petition for rehearing, styled "Petition for Rehearing and/or Clarification," of our September 20, 2007 opinion affirming a district court order that dismissed appellants' securities fraud action.

Contrary to the title of appellant's rehearing petition, appellants state that they are "not seek[ing] rehearing" of our September 20 opinion. Instead, appellants request that this court "remand this case to the district court with directions to permit [them] to seek leave to file a second amended complaint, thereby giving [them] the opportunity to allege state-law challenges" that do not conflict with the Securities Exchange Act of 1934 or any regulations promulgated thereto. But because we affirmed the district court's order dismissing appellants' complaint, effectively terminating this case, no portion of the case

remains to be litigated.[1] Second, leave to amend a complaint generally is within the district court's sound discretion,[2] and thus should have been sought in the district court in the first instance.[3]

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[1] See U.S. Ex Rel. Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220, 241 (1st Cir. 2004) (recognizing that the complaint's dismissal constitutes a final decision that "'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment'" (quoting Acevedo-Villalobos v. Hernandez, 22 F.3d 384, 388 (1st Cir. 1994)); cf. Greene v. Dist. Ct., 115 Nev. 391, 393-94, 990 P.2d 184, 185 (1999) (recognizing with approval the policy favoring the finality of judgments and terminating litigation expeditiously); Zalk-Josephs Co. v. Wells Cargo, Inc., 81 Nev. 163, 400 P.2d 621 (1965) (noting that when a district court dismisses a case for failure to state a claim on which relief can be granted, and the plaintiff fails to request leave to amend the complaint, the dismissal constitutes a decision on the merits for res judicata purposes).

As appellants point out in their petition, the district court's order does not indicate whether its dismissal was with prejudice. But "in the absence of a clear statement to the contrary," the dismissal of a complaint for failure to state a claim on which relief can be granted "is presumed to be with prejudice." See U.S. Ex Rel. Karvelas, 360 F.3d at 241; see also Greene, 115 Nev. at 393, 990 P.2d at 185 (noting that "[f]ederal court interpretations of Federal Rules of Civil Procedure, as counterparts to the Nevada Rules of Civil Procedure, are persuasive but not controlling authority").

[2] See NRCP 15(a) (providing that "[a] party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served . . . [o]therwise a party may amend the party's pleading only by leave of court"); Kantor v. Kantor, 116 Nev. 886, 891, 8 P.3d 825, 828 (2000) (noting that a motion for leave to amend under NRCP 15(a) is addressed to the district court's sound discretion).

[3] In opposing respondents' motion to dismiss the amended complaint based on NRCP 9(b), appellants asserted that any failure of their amended complaint to comply with that rule's pleading with particularity requirement "subjects the complaint to . . . dismissal with leave to amend." Appellants' request for

Additionally, even ignoring appellants' plain statement that they are "not seek[ing] rehearing" of our September 20 opinion, and instead construing appellants' petition as one to rehear the merits of our decision, rehearing is not warranted.[4]

It is so ORDERED.

/s/ MAUPIN, C.J.
Maupin

/s/ GIBBONS, J.
Gibbons

/s/ HARDESTY, J.
Hardesty

/s/ PARRAGUIRRE, J.
Parraguirre

/s/ DOUGLAS, J.
Douglas

/s/ CHERRY, J.
Cherry

/s/ SAITTA, J.
Saitta

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leave to amend unequivocally pertains only to the particularity of their fraud allegations, and thus is insufficient to constitute a request for leave to amend their complaint if the district court concluded, under NRCP 12(b)(5), that they failed to assert a claim on which relief could be granted. Indeed, appellants' rehearing petition fails to direct us to any request made in the district court that they be given leave to amend their complaint to assert viable state law claims.

[4] NRAP 40(c).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 17A of the Securities Exchange Act of 1934, 15 U.S.C. § 78q-1, provides:

Sec. 78q-1. National system for clearance and settlement of securities transactions

(a) Congressional findings; facilitating establishment of system

(1) The Congress finds that –

(A) The prompt and accurate clearance and settlement of securities transactions, including the transfer of record ownership and the safeguarding of securities and funds related thereto, are necessary for the protection of investors and persons facilitating transactions by and acting on behalf of investors.

(B) Inefficient procedures for clearance and settlement impose unnecessary costs on investors and persons facilitating transactions by and acting on behalf of investors.

(C) New data processing and communications techniques create the opportunity for more efficient, effective, and safe procedures for clearance and settlement.

(D) The linking of all clearance and settlement facilities and the development of uniform standards and procedures for clearance and settlement will reduce unnecessary costs and increase the protection of investors and persons facilitating transactions by and acting on behalf of investors.

(2)(A) The Commission is directed, therefore, having due regard for the public interest, the protection of investors, the safeguarding of securities and funds, and maintenance of fair competition among brokers and dealers, clearing agencies, and transfer agents, to use its authority under this chapter –

(i) to facilitate the establishment of a national system for the prompt and accurate clearance and settlement of transactions in securities (other than exempt securities); and

(ii) to facilitate the establishment of linked or coordinated facilities for clearance and settlement of transactions in securities, securities options, contracts of sale for future delivery and options thereon, and commodity options;

in accordance with the findings and to carry out the objectives set forth in paragraph (1) of this subsection.

(B) The Commission shall use its authority under this chapter to assure equal regulation under this chapter of registered clearing agencies and registered transfer agents. In carrying out its responsibilities set forth in subparagraph (A)(ii) of this paragraph, the Commission shall coordinate with the Commodity Futures Trading Commission and consult with the Board of Governors of the Federal Reserve System.

(b) Registration of clearing agencies; application; determinations by Commission requisite to registration of applicant as clearing agency; denial of participation; discipline; summary proceedings

(1) Except as otherwise provided in this section, it shall be unlawful for any clearing agency, unless reg-

istered in accordance with this subsection, directly or indirectly, to make use of the mails or any means or instrumentality of interstate commerce to perform the functions of a clearing agency with respect to any security (other than an exempted security). The Commission, by rule or order, upon its own motion or upon application, may conditionally or unconditionally exempt any clearing agency or security or any class of clearing agencies or securities from any provisions of this section or the rules or regulations thereunder, if the Commission finds that such exemption is consistent with the public interest, the protection of investors, and the purposes of this section, including the prompt and accurate clearance and settlement of securities transactions and the safeguarding of securities and funds. A clearing agency or transfer agent shall not perform the functions of both a clearing agency and a transfer agent unless such clearing agency or transfer agent is registered in accordance with this subsection and subsection (c) of this section.

(2) A clearing agency may be registered under the terms and conditions hereinafter provided in this subsection and in accordance with the provisions of section 78s(a) of this title, by filing with the Commission an application for registration in such form as the Commission, by rule, may prescribe containing the rules of the clearing agency and such other information and documents as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the prompt and accurate clearance and settlement of securities transactions.

(3) A clearing agency shall not be registered unless the Commission determines that –

(A) Such clearing agency is so organized and has the capacity to be able to facilitate the prompt and accurate clearance and settlement of securities transactions and derivative agreements, contracts, and transactions for which it is responsible, to safeguard securities and funds in its custody or control or for which it is responsible, to comply with the provisions of this chapter and the rules and regulations thereunder, to enforce (subject to any rule or order of the Commission pursuant to section 78q(d) or 78s(g)(2) of this title) compliance by its participants with the rules of the clearing agency, and to carry out the purposes of this section.

(B) Subject to the provisions of paragraph (4) of this subsection, the rules of the clearing agency provide that any (i) registered broker or dealer, (ii) other registered clearing agency, (iii) registered investment company, (iv) bank, (v) insurance company, or (vi) other person or class of persons as the Commission, by rule, may from time to time designate as appropriate to the development of a national system for the prompt and accurate clearance and settlement of securities transactions may become a participant in such clearing agency.

(C) The rules of the clearing agency assure a fair representation of its shareholders (or members) and participants in the selection of its directors and administration of its affairs. (The Commission may determine that the representation of participants is fair if they are afforded a reasonable opportunity to acquire voting stock of the clearing agency, directly or indirectly, in reasonable proportion to their use of such clearing agency.)

(D) The rules of the clearing agency provide for the equitable allocation of reasonable dues, fees, and other charges among its participants.

(E) The rules of the clearing agency do not impose any schedule of prices, or fix rates or other fees, for services rendered by its participants.

(F) The rules of the clearing agency are designed to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions, to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible, to foster cooperation and coordination with persons engaged in the clearance and settlement of securities transactions, to remove impediments to and perfect the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination in the admission of participants or among participants in the use of the clearing agency, or to regulate by virtue of any authority conferred by this chapter matters not related to the purposes of this section or the administration of the clearing agency.

(G) The rules of the clearing agency provide that (subject to any rule or order of the Commission pursuant to section 78q(d) or 78s(g)(2) of this title) its participants shall be appropriately disciplined for violation of any provision of the rules of the clearing agency by expulsion, suspension, limitation of activities, functions, and operations, fine, censure, or any other fitting sanction.

(H) The rules of the clearing agency are in accordance with the provisions of paragraph (5) of this subsection, and, in general, provide a fair procedure with respect to the disciplining of participants, the denial of participation to any person seeking participation therein, and the prohibition or limitation by the clearing agency of any person with respect to access to services offered by the clearing agency.

(I) The rules of the clearing agency do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter.

(4)(A) A registered clearing agency may, and in cases in which the Commission, by order, directs as appropriate in the public interest shall, deny participation to any person subject to a statutory disqualification. A registered clearing agency shall file notice with the Commission not less than thirty days prior to admitting any person to participation, if the clearing agency knew, or in the exercise of reasonable care should have known, that such person was subject to a statutory disqualification. The notice shall be in such form and contain such information as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(B) A registered clearing agency may deny participation to, or condition the participation of, any person if such person does not meet such standards of financial responsibility, operational capability, experience, and competence as are prescribed by the rules of the clearing agency. A registered clearing agency may examine and verify the qualifications of an applicant to be a participant in accordance with

procedures established by the rules of the clearing agency.

(5)(A) In any proceeding by a registered clearing agency to determine whether a participant should be disciplined (other than a summary proceeding pursuant to subparagraph (C) of this paragraph), the clearing agency shall bring specific charges, notify such participant of, and give him an opportunity to defend against such charges, and keep a record. A determination by the clearing agency to impose a disciplinary sanction shall be supported by a statement setting forth –

(i) any act or practice in which such participant has been found to have engaged, or which such participant has been found to have omitted;

(ii) the specific provisions of the rules of the clearing agency which any such act or practice, or omission to act, is deemed to violate; and

(iii) the sanction imposed and the reasons therefor.

(B) In any proceeding by a registered clearing agency to determine whether a person shall be denied participation or prohibited or limited with respect to access to services offered by the clearing agency, the clearing agency shall notify such person of, and give him an opportunity to be heard upon, the specific grounds for denial or prohibition or limitation under consideration and keep a record. A determination by the clearing agency to deny participation or prohibit or limit a person with respect to access to services offered by the clearing agency shall be supported by a statement setting forth the specific grounds on which the denial or prohibition or limitation is based.

(C) A registered clearing agency may summarily suspend and close the accounts of a participant who (i) has been and is expelled or suspended from any self-regulatory organization, (ii) is in default of any delivery of funds or securities to the clearing agency, or (iii) is in such financial or operating difficulty that the clearing agency determines and so notifies the appropriate regulatory agency for such participant that such suspension and closing of accounts are necessary for the protection of the clearing agency, its participants, creditors, or investors. A participant so summarily suspended shall be promptly afforded an opportunity for a hearing by the clearing agency in accordance with the provisions of subparagraph (A) of this paragraph. The appropriate regulatory agency for such participant, by order, may stay any such summary suspension on its own motion or upon application by any person aggrieved thereby, if such appropriate regulatory agency determines summarily or after notice and opportunity for hearing (which hearing may consist solely of the submission of affidavits or presentation of oral arguments) that such stay is consistent with the public interest and protection of investors.

(6) No registered clearing agency shall prohibit or limit access by any person to services offered by any participant therein.

(7)(A) A clearing agency that is regulated directly or indirectly by the Commodity Futures Trading Commission through its association with a designated contract market for security futures products that is a national securities exchange registered pursuant to section 78f(g) of this title, and that would be required to register pursuant to paragraph (1) of this subsection only because it performs the functions of a

clearing agency with respect to security futures products effected pursuant to the rules of the designated contract market with which such agency is associated, is exempted from the provisions of this section and the rules and regulations thereunder, except that if such a clearing agency performs the functions of a clearing agency with respect to a security futures product that is not cash settled, it must have arrangements in place with a registered clearing agency to effect the payment and delivery of the securities underlying the security futures product.

(B) Any clearing agency that performs the functions of a clearing agency with respect to security futures products must coordinate with and develop fair and reasonable links with any and all other clearing agencies that perform the functions of a clearing agency with respect to security futures products, in order to permit, as of the compliance date (as defined in section 78f(h)(6)(C)[1] of this title), security futures products to be purchased on one market and offset on another market that trades such products.

(8) A registered clearing agency shall be permitted to provide facilities for the clearance and settlement of any derivative agreements, contracts, or transactions that are excluded from the Commodity Exchange Act [7 U.S.C. 1 et seq.], subject to the requirements of this section and to such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter.

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[1] So in original. Probably should be "section 78f(h)(7)(C)".

(c) Registration of transfer agents

(1) Except as otherwise provided in this section, it shall be unlawful for any transfer agent, unless registered in accordance with this section, directly or indirectly, to make use of the mails or any means or instrumentality of interstate commerce to perform the function of a transfer agent with respect to any security registered under section 78*l* of this title or which would be required to be registered except for the exemption from registration provided by subsection (g)(2)(B) or (g)(2)(G) of that section. The appropriate regulatory agency, by rule or order, upon its own motion or upon application, may conditionally or unconditionally exempt any person or security or class of persons or securities from any provision of this section or any rule or regulation prescribed under this section, if the appropriate regulatory agency finds (A) that such exemption is in the public interest and consistent with the protection of investors and the purposes of this section, including the prompt and accurate clearance and settlement of securities transactions and the safeguarding of securities and funds, and (B) the Commission does not object to such exemption.

(2) A transfer agent may be registered by filing with the appropriate regulatory agency for such transfer agent an application for registration in such form and containing such information and documents concerning such transfer agent and any persons associated with the transfer agent as such appropriate regulatory agency may prescribe as necessary or appropriate in furtherance of the purposes of this section. Except as hereinafter provided, such registration shall become effective 45 days after receipt of such application by such appropriate regulatory

agency or within such shorter period of time as such appropriate regulatory agency may determine.

(3) The appropriate regulatory agency for a transfer agent, by order, shall deny registration to, censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding 12 months, or revoke the registration of such transfer agent, if such appropriate regulatory agency finds, on the record after notice and opportunity for hearing, that such denial, censure, placing of limitations, suspension, or revocation is in the public interest and that such transfer agent, whether prior or subsequent to becoming such, or any rson associated with such transfer agent, whether prior or subsequent to becoming so associated –

(A) has committed or omitted any act, or is subject to an order or finding, enumerated in subparagraph (A), (D), (E), (H), or (G) of paragraph (4) of section 78o(b) of this title, has been convicted of any offense specified in subparagraph (B) of such paragraph (4) within ten years of the commencement of the proceedings under this paragraph, or is enjoined from any action, conduct, or practice specified in subparagraph (C) of such paragraph (4); or

(B) is subject to an order entered pursuant to subparagraph (C) of paragraph (4) of this subsection barring or suspending the right of such person to be associated with a transfer agent.

(4)(A) Pending final determination whether any registration by a transfer agent under this subsection shall be denied, the appropriate regulatory agency for such transfer agent, by order, may postpone the effective date of such registration for a period not to exceed fifteen days, but if, after notice and oppor-

tunity for hearing (which may consist solely of affidavits and oral arguments), it shall appear to such appropriate regulatory agency to be necessary or appropriate in the public interest or for the protection of investors to postpone the effective date of such registration until final determination, such appropriate regulatory agency shall so order. Pending final determination whether any registration under this subsection shall be revoked, such appropriate regulatory agency, by order, may suspend such registration, if such suspension appears to such appropriate regulatory agency, after notice and opportunity for hearing, to be necessary or appropriate in the public interest or for the protection of investors.

(B) A registered transfer agent may, upon such terms and conditions as the appropriate regulatory agency for such transfer agent deems necessary or appropriate in the public interest, for the protection of investors, or in furtherance of the purposes of this section, withdraw from registration by filing a written notice of withdrawal with such appropriate regulatory agency. If such appropriate regulatory agency finds that any transfer agent for which it is the appropriate regulatory agency, is no longer in existence or has ceased to do business as a transfer agent, such appropriate regulatory agency, by order, shall cancel or deny the registration.

(C) The appropriate regulatory agency for a transfer agent, by order, shall censure or place limitations on the activities or functions of any person associated, seeking to become associated, or, at the time of the alleged misconduct, associated or seeking to become associated with the transfer agent, or suspend for a period not exceeding twelve months or bar any such person from being associated with the transfer

agent, if the appropriate regulatory agency finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or bar is in the public interest and that such person has committed or omitted any act, or is subject to an order or finding, enumerated in subparagraph (A), (D), (E), (H), or (G) or[1] paragraph (4) of section 78o(b) of this title, has been convicted of any offense specified in subparagraph (B) of such paragraph (4) within ten years of the commencement of the proceedings under this paragraph, or is enjoined from any action, conduct, or practice specified in subparagraph (C) of such paragraph (4). It shall be unlawful for any person as to whom such an order suspending or barring him from being associated with a transfer agent is in effect willfully to become, or to be, associated with a transfer agent without the consent of the appropriate regulatory agency that entered the order and the appropriate regulatory agency for that transfer agent. It shall be unlawful for any transfer agent to permit such a person to become, or remain, a person associated with it without the consent of such appropriate regulatory agencies, if the transfer agent knew, or in the exercise of reasonable care should have known, of such order. The Commission may establish, by rule, procedures by which a transfer agent reasonably can determine whether a person associated or seeking to become associated with it is subject to any such order, and may require, by rule, that any transfer agent comply with such procedures.

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[1] So in original. Should probably be "of".

(d) Activities of clearing agencies and transfer agents; enforcement by appropriate regulatory agencies

(1) No registered clearing agency or registered transfer agent shall, directly or indirectly, engage in any activity as clearing agency or transfer agent in contravention of such rules and regulations (A) as the Commission may prescribe as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter, or (B) as the appropriate regulatory agency for such clearing agency or transfer agent may prescribe as necessary or appropriate for the safeguarding of securities and funds.

(2) With respect to any clearing agency or transfer agent for which the Commission is not the appropriate regulatory agency, the appropriate regulatory agency for such clearing agency or transfer agent may, in accordance with section 1818 of title 12, enforce compliance by such clearing agency or transfer agent with the provisions of this section, sections 78q and 78s of this title, and the rules and regulations thereunder. For purposes of the preceding sentence, any violation of any such provision shall constitute adequate basis for the issuance of an order under section 1818(b) or 1818(c) of title 12, and the participants in any such clearing agency and the persons doing business with any such transfer agent shall be deemed to be "depositors" as that term is used in section 1818(c) of title 12.

(3)(A) With respect to any clearing agency or transfer agent for which the Commission is not the appropriate regulatory agency, the Commission and the appropriate regulatory agency for such clearing agency or transfer agent shall consult and cooperate

with each other, and, as may be appropriate, with State banking authorities having supervision over such clearing agency or transfer agent toward the end that, to the maximum extent practicable, their respective regulatory responsibilities may be fulfilled and the rules and regulations applicable to such clearing agency or transfer agent may be in accord with both sound banking practices and a national system for the prompt and accurate clearance and settlement of securities transactions. In accordance with this objective –

(i) the Commission and such appropriate regulatory agency shall, at least fifteen days prior to the issuance for public comment of any proposed rule or regulation or adoption of any rule or regulation concerning such clearing agency or transfer agent, consult and request the views of the other; and

(ii) such appropriate regulatory agency shall assume primary responsibility to examine and enforce compliance by such clearing agency or transfer agent with the provisions of this section and sections 78q and 78s of this title.

(B) Nothing in the preceding subparagraph or elsewhere in this chapter shall be construed to impair or limit (other than by the requirement of notification) the Commission's authority to make rules under any provision of this chapter or to enforce compliance pursuant to any provision of this chapter by any clearing agency, transfer agent, or person associated with a transfer agent with the provisions of this chapter and the rules and regulations thereunder.

(4) Nothing in this section shall be construed to impair the authority of any State banking authority or other State or Federal regulatory authority having

jurisdiction over a person registered as a clearing agency, transfer agent, or person associated with a transfer agent, to make and enforce rules governing such person which are not inconsistent with this chapter and the rules and regulations thereunder.

(5) A registered transfer agent may not, directly or indirectly, engage in any activity in connection with the guarantee of a signature of an endorser of a security, including the acceptance or rejection of such guarantee, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest, for the protection of investors, to facilitate the equitable treatment of financial institutions which issue such guarantees, or otherwise in furtherance of the purposes of this chapter.

(e) Physical movement of securities certificates

The Commission shall use its authority under this chapter to end the physical movement of securities certificates in connection with the settlement among brokers and dealers of transactions in securities consummated by means of the mails or any means or instrumentalities of interstate commerce.

(f) Rules concerning transfer of securities and rights and obligations of involved or affected parties

(1) Notwithstanding any provision of State law, except as provided in paragraph (3), if the Commission makes each of the findings described in paragraph (2)(A), the Commission may adopt rules concerning –

(A) the transfer of certificated or uncertificated securities (other than government securities issued pursuant to chapter 31 of title 31 or securities

otherwise processed within a book-entry system operated by the Federal Reserve banks pursuant to a Federal book-entry regulation) or limited interests (including security interests) therein; and

(B) rights and obligations of purchasers, sellers, owners, lenders, borrowers, and financial intermediaries (including brokers, dealers, banks, and clearing agencies) involved in or affected by such transfers, and the rights of third parties whose interests in such securities devolve from such transfers.

(2)(A) The findings described in this paragraph are findings by the Commission that –

(i) such rule is necessary or appropriate for the protection of investors or in the public interest and is reasonably designed to promote the prompt, accurate, and safe clearance and settlement of securities transactions;

(ii) in the absence of a uniform rule, the safe and efficient operation of the national system for clearance and settlement of securities transactions will be, or is, substantially impeded; and

(iii) to the extent such rule will impair or diminish, directly or indirectly, rights of persons specified in paragraph (1)(B) under State law concerning transfers of securities (or limited interests therein), the benefits of such rule outweigh such impairment or diminution of rights.

(B) In making the findings described in subparagraph (A), the Commission shall give consideration to the recommendations of the Advisory Committee established under paragraph (4), and it shall consult with and consider the views of the Secretary of the Treasury and the Board of Governors of the Federal

Reserve System. If the Secretary of the Treasury objects, in writing, to any proposed rule of the Commission on the basis of the Secretary's view on the issues described in clauses (i), (ii), and (iii) of subparagraph (A), the Commission shall consider all feasible alternatives to the proposed rule, and it shall not adopt any such rule unless the Commission makes an explicit finding that the rule is the most practicable method for achieving safe and efficient operation of the national clearance and settlement system.

(3) Any State may, prior to the expiration of 2 years after the Commission adopts a rule under this subsection, enact a statute that specifically refers to this subsection and the specific rule thereunder and establishes, prospectively from the date of enactment of the State statute, a provision that differs from that applicable under the Commission's rule.

(4)(A) Within 90 days after October 16, 1990, the Commission shall (and at such times thereafter as the Commission may determine, the Commission may), after consultation with the Secretary of the Treasury and the Board of Governors of the Federal Reserve System, establish an advisory committee under the Federal Advisory Committee Act (5 U.S.C. App.). The Advisory Committee shall be directed to consider and report to the Commission on such matters as the Commission, after consultation with the Secretary of the Treasury and the Board of Governors of the Federal Reserve System, determines, including the areas, if any, in which State commercial laws and related Federal laws concerning the transfer of certificated or uncertificated securities, limited interests (including security interests) in such securities, or the creation or perfection of

security interests in such securities do not provide the necessary certainty, uniformity, and clarity for purchasers, sellers, owners, lenders, borrowers, and financial intermediaries concerning their respective rights and obligations.

(B) The Advisory Committee shall consist of 15 members, of which –

(i) 11 shall be designated by the Commission in accordance with the Federal Advisory Committee Act; and

(ii) 2 each shall be designated by the Board of Governors of the Federal Reserve System and the Secretary of the Treasury.

(C) The Advisory Committee shall conduct its activities in accordance with the Federal Advisory Committee Act. Within 6 months of its designation, or such longer time as the Commission may designate, the Advisory Committee shall issue a report to the Commission, and shall cause copies of that report to be delivered to the Secretary of the Treasury and the Chairman of the Board of Governors of the Federal Reserve System.

Section 28(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a), provides:

Sec. 78bb. Effect on existing law

(a) Addition of rights and remedies; recovery of actual damages; State securities commissions

Except as provided in subsection (f) of this section, the rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity; but no person permitted to maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of. Except as otherwise specifically provided in this chapter, nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder. No State law which prohibits or regulates the making or promoting of wagering or gaming contracts, or the operation of "bucket shops" or other similar or related activities, shall invalidate any put, call, straddle, option, privilege, or other security subject to this chapter, or apply to any activity which is incidental or related to the offer, purchase, sale, exercise, settlement, or closeout of any such security. No provision of State law regarding the offer, sale, or distribution of securities shall apply to any transaction in a security futures product, except that this sentence shall not be construed as limiting any State antifraud law of general applicability.

Section 16(a) of the Securities Act of 1933, 15 U.S.C. § 77p(a), provides:

Sec. 77p. Additional remedies; limitation on remedies

(a) Remedies additional

Except as provided in subsection (b) of this section, the rights and remedies provided by this subchapter shall be in addition to any and all other rights and remedies that may exist at law or in equity.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court
(202) 479-3011

December 14, 2007

Mr. David C. Frederick
Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, DC 20036

Re: NanoPierce Technologies, Inc., et al.
v. Depository Trust and Clearing Corporation, et al.
Application No. 07A485

Dear Mr. Frederick:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kennedy, who on December 14, 2007 extended the time to and including February 4, 2008.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
by /s/ GAIL JOHNSON

Gail Johnson
Case Analyst

[attached notification list omitted]